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THE PRODUCT LIABILITY REFORM ACT

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Mr. DANFORTH, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2760]

together with

ADDITIONAL AND MINORITY VIEWS

The Committee on Commerce, Science, and Transportation, having considered an original bill (S. 2760) to regulate interstate commerce by providing for a uniform product liability law, and for other purposes, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF THE BILL

This original bill, S. 2760, as reported, preempts state law to impose major reforms of product liability law in the United States.

The present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. It does not benefit manufacturers, product sellers, or injured persons. The system's high transaction costs, which exceed the compensation paid to victims, are passed on to consumers; moreover, the unpredictability, uncertainties, and inefficiencies of the system have been linked to the increasing cost and unavailability of liability insurance. Because of the serious burden on interstate commerce created by these product liability problems, federal legislation is needed.

S. 2760, as reported, addresses these problems by making a number of significant reforms that are applicable in all product li-

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ability actions in State and Federal courts. These reforms, which include the establishment of an expedited settlement system with incentives for parties to settle claims quickly, will reduce transaction costs and provide greater certainty as to the rights and responsibilities of all those involved in product liability disputes.

Background and Need

Introduction

Traditionally, product liability has been a matter left to state law, but today the morass of product liability law is a problem of national concern that requires Congressional action. The system of compensating people injured by defective products is costly, slow, inequitable, and unpredictable. It hurts business and consumers as well as our competitive position in world markets.

Many consumers who are injured by defective products and deserve compensation are unable to recover damages or must wait years for recovery. They are caught up with manufacturers and product sellers in a product liability litigation system that has often been characterized as a legal lottery, a system in which identical cases can produce startlingly different results. Moreover, injured victims with the severest injuries tend to receive far less than their actual economic losses, while those with minor injuries are overcompensated.

The inefficiency and unpredictability of the product liability system have been linked to the increasing cost and unavailability of liability insurance. An increasing number of companies, whether they make such products are sporting goods, textile manufacturing equipment, machine tools, medical devices or vaccines, cannot buy adequate insurance coverage. Some have had their insurance cancelled or have experienced reduced coverage with increased deductibles at higher prices. Others cannot obtain coverage at any price.

Thus, the present system has an adverse impact on plaintiffs and defendants, manufacturers, product sellers and consumers. The individual states cannot fully address the problems of the product liability system. Reform at the Federal level is urgently needed.

The Present Product Liability System: Costly, Slow, Inequitable, and Unpredictable

1. Costs

The present product liability system's transaction costs—the costs of litigation, court costs, and attorney's fees—are enormous. Today, plaintiff and defense lawyers collect almost as much from the system as injured victims do; most of the money paid out by manufacturers never reaches the victims at all.[1]

The inefficiency of the present system has been noted often,[2] and has most recently been demonstrated by preliminary study results released July 29, 1986, by the Rand Institute for Civil Justice, which show that the annual overall transaction costs of the U.S. tort system exceed compensation to plaintiffs. The Rand study

[1] Footnotes at end.

found that in 1985, net compensation totaled $13 to $15 billion, but the transaction costs—including plaintiff's attorney's fees, defense legal fees, public expenditures and the time of the litigants—were between $15 billion and $19 billion.[3]

The pattern in product liability cases, alone, is consistent with these findings. According to calculations derived from a comprehensive 1977 survey of 24,452 closed claims conducted by the Insurance Service Office (ISO), for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs.[4] Moreover, for every dollar awarded to a claimant, he or she typically pays a contingent fee of 33 cents in legal costs and therefore receives about 67 cents. Thus, on this basis (adding the average defense cost to the contingent fee) one can estimate that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant.

Not only do these transaction costs exceed compensation, but they have risen dramatically in recent years. According to a 1986 study by economists at New York University, the tort system's administrative or transaction cost—the amount spent to adjust and litigate claims made by injured parties—has been rising rapidly since 1983.[5] This study notes:

> These increases portend trouble ahead if they are not checked. If current rates of growth continue, we can expect that by 1990 we will be spending between $31 and $38 billion per year simply administering the tort system.[6]

With respect to general liability insurance, including product liability, ISO recently reported that the total legal defense expenses incurred in 1984 were $2.7 billion, and that the proportion of general liability costs incurred by insurers that are consumed by legal defense costs has nearly tripled between 1960 and 1984. Most of this growth has occurred recently: the defense costs per dollar paid to claimants doubled in the last decade.[7]

Ordinarily, legal defense costs for product liability claims are paid by insurers; however, because defense costs have escalated so rapidly, the insurance industry has proposed to change the commercial general liability form to include some defense costs within the aggregate limits of the policy. Such a change would only increase the burden of product liability litigation on manufacturers and product sellers, as well as consumers, to whom these costs will ultimately be passed on.

Neither plaintiffs nor defendants benefit from the rapidly increasing and excessive costs of the present system for resolving product liability disputes.

2. Delay

A second problem with the present product liability system is delay. This is particularly a concern for seriously injured victims, who are often in desperate financial straits and must wait years to be compensated while litigation drags on.

One survey has shown that 36 percent of bodily injury losses in product liability cases are not paid until at least 4 years after the first report, and that it takes 5 years to pay the claim with the av-

erage dollar amount of loss. This study also found that "larger claims tend to take much longer to close than smaller ones."[8]

Another, more recent insurance industry study found that the victims of the severest injuries have to wait the longest. This study found that in cases in which payment exceeded $100,000, 21.6 percent of claimants waited more than five years for payment. Only 2.1 percent were paid less than a year after they reported their injury, and 62.6 percent took more than three years to be paid.[9]

The chart below shows the results of this study, which compared earlier data from 1975. (The 1975 figures are in parentheses.)

Claims over $100,000

Number of years between date claim reported to insurer and date claim closed	Number of claimants	Percent of claimants	Percent of total payments
1 year or less	4 (5)	2.1 (4.6)	1.6 (4.3)
Over 1 year to 2 years	21 (17)	11.1 (15.7)	10.9 (15.3)
Over 2 years to 3 years	46 (27)	24.2 (25.0)	23.0 (23.5)
Over 3 years to 4 years	41 (17)	21.6 (15.7)	18.5 (19.7)
Over 4 years to 5 years	37 (27)	19.5 (25.0)	26.8 (20.7)
Over 5 years to 10 years	41 (15)	21.6 (13.9)	19.2 (16.5)

The comparison with the 1975 data shows that the problem of delay has actually worsened. In 1975, 54.6 percent of claimants took more than three years to be paid; five years later that number had risen to 62.7 percent.

Such delays plague even the many product liability cases which are settled before trial. One plaintiff's attorney has explained that even though most cases are settled, "most settlement negotiations get serious only a week or so before trial is scheduled to begin." The pattern has become so dependable that "each week the [lawyer's] firm projects cash flow by estimating the settlement value of the cases set for trial the following week."[10]

Delay also can result in undercompensation of victims. Because many victims of injury—particularly those with the most severe injuries—have inadequate resources to pay for their medical and rehabilitation expenses, they are forced to settle for less than their full losses in order to get some payment because they cannot afford to wait longer without compensation.[11] Studies have shown that when rehabilitation has to be delayed, victims do not recover as fully as they do when the problem is treated promptly.[12]

3. Inequitable compensation

Not only does the present product liability system generate excessive costs and delays; it is unable to compensate fairly injured victims in proportion to their losses. Numerous studies have found that the tort system grossly overpays people with small losses, while underpaying people with the most serious losses.

This disturbing pattern was revealed as early as 1983 by a Columbia University report on auto accidents, and the findings of this report have been independently confirmed in the years since by more than a dozen detailed studies.[13] More recently, the 1977 ISO product liability study found that injured plaintiffs with losses between $1 and $1,000 received, on the average, 859 percent of their

losses, while those with losses of over $1 million received, on the average, 15 percent of their losses (*before* paying their attorney's fees).[14] In general, the study found, compensation exceeded economic loss when losses were below $100,000, and then dropped dramatically below economic loss when the claimant's loss exceeded $100,000.[15]

A 1980 insurance industry study of the largest product liability claims confirmed that the most severely injured victims do not even receive full compensation for their pain and suffering. For every dollar of past and future economic loss, the tort system paid claimants $1.22, but if the standard 33 percent attorney's contingent fee is deducted, these claimants were left with only about 81 cents for every dollar of loss.[16]

Other studies have shown that people with lower incomes and lower educational levels recover far less than their middle class counterparts because they have less access to attorneys, cannot afford to wait as long to recover, and often are not good witnesses.[17]

Reform of the product liability system is essential to assure that those who are injured by defective products are fairly compensated in proportion to their losses.

4. Unpredictability

The excessive costs, delays, and inequities of the product liability system are exacerbated by the inherent uncertainties and unpredictability of the system. Indeed, the present product liability system has been characterized as a latter, in which "[l]awyers' talents, plaintiffs' demeanor, defendants' grit, and the idiosyncrasies of jury composition combine to hand similar victims altogether dissimilar results."[18]

As Professor Jeffrey O'Connell has explained in testimony before the Committee:

> If you are badly injured in our society by a product and you go to the highly skilled lawyer . . . in all honesty [the lawyer] cannot tell you what you will be paid, when you will be paid, or indeed if you will be paid.[19]

The present system's uncertainty is a problem for both manufacturers and consumers injured by defective products. Defendants need greater certainty as to the scope of their liability under the law. Plaintiffs need faster, more certain recovery that fully compensates them for their real losses.

The inherent uncertainty of the system has been linked by commentators to the diversity of legal standards applied in different jurisdictions and the doctrinal mixture of contract and tort law applied in product liability cases.[20] In addition, it has been linked to expanding doctrines of liability,[21] the difficulties in establishing causation and fault, as well as the difficulties in translating nonpecuniary loss (pain and suffering) into pecuniary terms.[22]

The uncertainties and unpredictability of the system affect settlements as well as judgments. Settlement negotiations are sabotaged by the lack of clear standards. With respect to punitive damage claims, for example, uncertainties about liability standards make it difficult for manufacturers to negotiate sensibly.[23]

The burden on American productivity and commerce

The present product liability litigation system has become an enormous burden an American productivity and commerce. It deprives consumers of needed products, limits job opportunities, and weakens our competitive position in world markets.

This burden has been increased by what some have described as a "litigation explosion".[24] The number of product liability cases filed in federal district courts has increased from 1,579 in 1974 to 13,554 in 1985, a 758 percent increase.[25] No corresponding figure is available from state courts, which do not maintain separate statistics on product liability claims, but overall civil caseloads have been rising there as well.[26]

The impact of increasing product liability litigation has been felt by manufacturers for more than a decade, and it has been linked to the present crisis with respect to the unavailability and unaffordability of liability insurance. This crisis has been extensively documented in the press,[27] and the Committee has held several hearings on the problem.[28] At those hearings, witnesses testified that the insurance crisis stems in part from cyclical fluctuations in the insurance industry, but many witnesses also cited as contributing factors growing litigation and claim costs; they linked the insurance problem to the inherent unpredictability of the tort litigation system, as well as the increasing difficulty of predicting potential losses due to expanding concepts of liability.

It has been suggested that the business cycle of the insurance industry and industry practices are entirely to blame for current unaffordability and unavailability problems. This ignores the increase in the overall costs of the tort litigation system—an increase which has been felt as much by self-insurers as well as by those who purchase liability insurance. For example, the City of New York, which is self-insured, has recorded total tort judgments and settlements of more than $100 million for almost every year since 1981, although they never approached that level before. Moreover, the dollar value of New York City's average personal injury settlement rose from $7,127 in 1977 to $31,740 in 1985, an increase of 345 percent.[29]

While insurance prices appear likely to stabilize eventually, analysts have concluded that unless the underlying tort system's costs are reduced, they will do so at a very high level. "Prices will doubtless plateau at some point and at some level, but if current trends continue, it seems clear that this will occur at a height that will institutionalize the price shock that will have occurred in the meantime." [30] Numerous studies of the present insurance crisis have independently reached the same conclusion: the rising cost of the tort system is a fundamental cause of the crisis.[31]

But the insurance crisis is only one element of the burden imposed on American productivity and commerce by the product liability litigation system and the overall tort system. The adverse impact of this burden is felt in many ways, and it is not only a matter of obtaining insurance coverage. Much of the cost of the product liability system is borne today directly by manufacturers and product sellers, because there has been a long, continuing trend toward self-insurance among American businesses. In those

policies that have been sold, deductibles have been increasing while policy limits have been shrinking.

The expense of litigating claims diverts resources from productive efforts. Similarly, excessive management time is diverted from production to assessment of legal claims, and the uncertainties of the system deter the development of new products or product improvements. Clearly, the result is not in the best interest of manufacturers or consumers.

Moreover, faced with the costs and uncertainties of the present system, manufacturers may eliminate a particular product line or terminate operations altogether if the costs of product liability exposure become too burdensome.[32] One survey of the impact of product liability on machinery industries found that 13.5 percent of the companies had dropped product lines, while 11.5 percent had decided not to develop a particular new product.[33] One example illuminates the problem:

> In Virginia, William Perry, an engineer, set up a company to design and build hand and foot controls for cars and vans. Perry's son had been crippled in a motorcycle accident, and the father was appalled when he saw the devices available to handicapped drivers. His company has never been sued, but he recently stopped selling his product nonetheless: his liability insurance premiums went up over 1,000% in one year. Says Perry, "I would have continued this business even at a loss if I could have got a decent premium." [34]

Many other examples have been brought to the attention of the Committee, as well. Puritan-Bennett of Overland Park, Kansas, a leading U.S. manufacturer of hospital equipment, stopped making anesthesia gas machines in 1984 because of rising liability risks. These life-saving machines were once made by half a dozen companies; now the only producers are two foreign-owned firms.[35]

Moreover, concerns about product liability appear to be a major contributor to the dramatic decline in the number of manufacturers of vaccines, which has been accompanied by sharply rising prices. During the 1960's, there were eight manufacturers of the combined vaccine that is used to immunize children against diptheria, whooping cough, and tetanus. Today, only one remains, and the cost of the vaccine has skyrocketed. The price per shot was 45 cents in 1982; no it is $11.40, and most of the increases goes into a fund against lawsuits.[36] In the 1960's there were three manufacturers or oral polio vaccine; now there is one.[37] "If present trends are any indication," one writer has concluded, "it appears that the tort system's vagaries will ultimately drive mass immunization programs out of the private sector altogether.[38]

The general aviation industry is another sector of the economy that has been adversely affected by the product liability system. In 1985, insurance premiums averaged $70,000 per airplane, despite the general aviation industry's best safety record in years. These costs have had a devastating effect on sales—and on jobs. In 1979, more than 17,000 general aviation aircraft were sold by United States Manufacturers. In 1985, such sales has dropped by nearly 90 percent. As a result, tens of thousands of workers have been laid

off, and unemployment in the industry is now over 50 percent. Among only the seven largest manufacturers of general aviation aircraft, employment dropped from 40,000 in 1980 to 13,500 in June, 1986.[39]

The adverse effects of the product liability system have carried over into international trade. American manufacturers and product sellers generally pay product liability insurance rates which are 20 time higher than those in Europe.[40] This disparity is attributable in large part to the uncertainties and costs of the American tort litigation system.[41] As a result of this disparity, American manufacturers and product sellers may be at a competitive disadvantage in both foreign and domestic markets. Insurers generally do not discount premiums where a manufacturer exports it goods, because there is always the possibility that a product-related suit will be brought in the United States. Thus, each U.S. product shipped abroad contains an insurance cost element greater than that of a foreign competitor.[42] With respect to domestic markets, the effect of the current uncertainties in product liability law is similar. The price of imported products can be lower because product liability insurance rates for those products are lower.[43]

The limitations of State efforts at reform

In 1978, the Federal Interagency Task Force on Product Liability, after conducting an 18-month study of the problem, issued a report which suggested that a model product liability act be drafted with the idea that reforms of the system would be enacted at the Federal level.[44] A final version of this model law, known as the Uniform Product Liability Act (UPLA), was published on October 31, 1979.[45]

However, UPLA, which ultimately was offered as a model State law, has not been adopted in full in any State. Over 30 States have adopted some form of product liability statute, and others have enacted more general tort reform measures.[46] The States' efforts have been helpful and are to be encouraged; however, those efforts at State law reform have not resolved the overall problems of the product liability tort litigation system. Most State statutes are not comprehensive and fail to address all the key issues that arise in product liability litigation. Even if an individual State adopted a comprehensive product liability statute so that its own law was clear and predictable, the legal rules would still vary from State to State.

Individual States cannot address the problems of the product liability system effectively, because reform within one State does little to resolve the tort litigation problems facing those who deal in an interstate market. Products are manufactured, sold, used, and insured in a nationwide market. Data show that most products manufactured in a given State are consumed or used outside that State.[47] As a result, manufacturers and product sellers may be involved in product liability actions governed by the law of any State in which they do business. An attempt by any one State to reform the system cannot relieve the overall burden imposed on interstate commerce.[48] In New York State, the Governor's Advisory Commission on Liability Insurance recently reached the same conclusion:

> Though we are stout defenders of State prerogatives in any area where the context permits at least minimally efficient State governance, we do not believe that product liability any longer falls into that category. The interpenetration of markets, the speed of movement of goods and money, the increasing demanding test of international competition all militate against a system which subjects product makers and sellers to a patchwork of 50 different sets of liability rules. In today's commercial world, such a system, far from permitting States like New York to impose rigorous and effective standards, simply shifts the balance of governmental influence in the direction of other States with different standards, where the same type of action can often be brought against the same defendant with quite a different potential outcome. Though we feel that product liability is unique among areas of tort law in this respect, we do believe that in this single case the case for Federal intervention is compelling.[49]

Thus, Federal legislation is needed. The enactment of this kind of law is within Congress' power to regulate interstate commerce.[50] There are numerous examples of Federal legislation in areas where diverse State laws were deemed a burden on interstate commerce.[51] The fact that product liability law is traditionally an area of State law does not alter the fact that Federal legislation in this area, under the Supremacy Clause, can preempt State law to relieve the enormous burden imposed by the product liability system on American commerce.[52]

The Federal response

In the mid-1970's, product liability was first recognized as a serious problem of interstate commerce which, in the view of many businesses and academic observers, has reached "crisis" proportions and required a federal response. This recognition came as a result of an increase in product liability claims and litigation and an increase in product liability insurance premiums.

The Federal Government responded to these concerns in 1976 by creating a Federal Interagency Task Force on Product Liability to examine the product liability problem. The task force, chaired by the Department of Commerce, conducted an 18-month study which culminated in a series of reports confirming the legitimacy of the business community's concerns.[53] There was substantial evidence that the cost of product liability insurance had increased dramatically in the early to mid-1970's and evidence that the number of product liability actions had increased.[54]

In 1978, the Department of Commerce formed a second Task Force on Product Liability and Accident Compensation. This new task force developed an options paper outlining what action, if any, the Federal Government should take to address the causes of the product liability problem. The paper found that "the 'hodge-podge' of rules in each of the 50 states makes it almost impossible to set [insurance] rates with any degree of confidence," and recommended that a model product liability law be drafted for implementation at the Federal or State level.[55]

In October 1985, similar concerns prompted the Attorney General to establish the Tort Policy Working Group, an inter-agency working group consisting of representatives of ten agencies and the White House. Earlier this year, this group issued the Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability. This report recommended a number of tort law reforms applicable to product liability cases. Subsequently, the administration drafted federal product liability legislation based on the recommendations contained in this report.

The Risk Retention Act

The earlier federal task forces on product liability had identified the uncertainties of the product liability system and overly subjective insurance ratemaking procedures as two principal causes of the product liability problem. S. 2760 addresses the underlying uncertainties of the product liability system, as well as other fundamental concerns about the system raised in the more recent report of the Tort Policy Working Group.

With regard to the insurance ratemaking aspect of the problem, the 97th Congress responded by enacting the Product Liability Risk Retention Act of 1981.[56] This act is designed to resolve the problem of overly subjective ratemaking procedures by creating two alternatives to the ordinary purchase of product liability insurance. First, the Act facilitates the formation of self-insurance cooperatives, known as risk retention groups. Prior to the Act, such groups had been extremely difficult to form, because they were subject to conflicting and duplicative regulations among the various states. The second alternative created by the act is the purchasing group. Businesses forming purchasing groups can now bargain collectively for lower commercial liability insurance premiums.

The Risk Retention Act's options of self-insuring or banding together to obtain lower insurance premiums are intended to encourage commercial insurers to offer product liability insurance at competitive rates and to set premiums accurately. Earlier this year, as a response to the current crisis with respect to the unavailability and high cost of liability insurance, the Committee reported S. 2129, the Risk Retention Amendments of 1986, which would expand the Risk Retention Act to apply to other lines of general liability insurance, in addition to product liability.[57] This legislation was passed by the full Senate on July 17, 1986.[58]

Legislative History

S. 2760 is an original bill that was ordered to be reported by the Committee after consideration in six days of executive session and after seven days of Consumer Subcommittee hearings on product liability legislation in this Congress. This bill embodies elements of a number of product liability reform measures considered by the Committee in this Congress. It has evolved from more than 50 days of hearings over a nine-year period before six congressional committees.

Prior to this Congress, the Committee already had a long history of involvement with product liability reform and had reported two

other bills on the subject, which were introduced by Senator Kasten. S. 2631 was reported by the Committee in the 97th Congress (S. Rep. 97-670), and S. 44 was reported by the Committee in the 98th Congress (S. Rep. 98-476). Congress adjourned without Senate action on either of these measures.

At the beginning of this Congress, on January 3, 1985, Senator Kasten introduced S. 100, the Product Liability Act. This bill would have preempted State law to impose uniform federal rules and standards of liability governing the recovery of damages for injuries caused by defective products. This bill was substantially the same as S. 44, which had been reported by the Committee during the 98th Congress, but which was not considered by the full Senate prior to adjournment.

A Consumer Subcommittee hearing on S. 100 was held on March 21, 1985 (Serial No. 99-84) and the bill was reviewed by the Committee at an executive session on May 16, 1985. At that session, the motion to report the bill was defeated by an 8-8 vote.

Prior to the May 16, 1985 executive session, two amendments in the nature of a substitute to S. 100 had been introduced. One of these amendments (S. Amdt. No. 16) was introduced by Senator Dodd on March 19, 1985, and the other (S. Amdt. No. 100) was introduced by Senator Gorton on May 14, 1985. These amendments were complete substitutes for S. 100 that preempted certain aspects of State law and also would have established alternative expedited claim systems for limited recovery of damages in product liability cases. Hearings on the Dodd and Gorton amendments were held by the Consumer Subcommittee on June 18 and June 25, 1985 (Serial No. 99-177).

After these hearings, the Committee staff was instructed by Senator Danforth to draft a proposal that combined elements of all these measures. The first draft was released for public comment on July 15, 1985. After review of the extensive comments received from the public, a second draft was released on November 20, 1985. This draft was formally introduced by Senator Danforth on December 20, 1985, as S. 1999. This bill, which was cosponsored by Senators Dodd and Kassebaum, was the subject of two days of hearings before the Consumer Subcommittee on February 27 and March 11, 1986.

On April 30, 1986, Senator Kasten introduced an amendment in the nature of a substitute for S. 100 (S. Amdt. No. 1814).[59] This amendment embodied recommendations for product liability reform that has been made by the administration's Tort Policy Working Group.[60]

On May 12, 1986, Senator Danforth introduced an amendment in the nature of a substitute for S. 1999 (S. Amdt. No. 1951).[61] This amendment, which was cosponsored by Senator Dodd, replaced the expedited claim system of S. 1999 with an expedited settlement system and made a number of other changes in S. 1999. On May 20, 1986, Senator Gorton introdced an amendment in the nature of a substitute for the Danforth amendment (S. Amdt. No. 1968).[62] On May 19 and 20, 1986, the Consumer Subcommittee held hearings on the Kasten amendment, the Danforth amendment, and the other product liability measures before the Committee.

On June 3, 1986, the Committee began its markup of product liability legislation. The markup draft bill was an original bill that embodied the provisions of the Danforth amendment to S. 1999. On June 12, the Committee adopted an amendment in the nature of a substitute for the original markup draft bill. This amendment contained product liability reform provisions that had been agreed to by Senators Danforth, Gorton, and Kasten as a "core package" of product liability reforms. On June 12, 19, 24, 25 and 26, 1986, the Committee continued its consideration of this core package and added a number of other amendments before reporting S. 2760 as an original bill.

SUMMARY OF MAJOR PROVISIONS

Expedited Product Liability Settlements

The expedited settlement procedure mandated by Title II of the bill creates incentives for both claimants (plaintiffs) and defendants to settle product liability claims quickly. Within a short time after the commencement of a suit against a product manufacturer or seller for harm caused by a product, any party to the litigation would have the option of seeking to settle the dispute on an expedited basis. Elements of the expedited settlement offer would be limited to (A) payment of the claimant's net economic loss and (B) $100,000 for dignitary loss. Net economic loss is defined as those actual expenses that are not reimbursed by other sources. Dignitary loss encompasses pain and suffering arising from the death of a parent, spouse, or child, serious and permanent disfigurement, loss of a limb or organ, or serious and permanent impairment of a bodily function.

The recipient of such a settlement offer has the option of accepting the offer, rejecting it, or disputing its validity with respect to the inclusion or exclusion of the dignitary loss payment of $100,000. If the offer is accepted, the claimant is barred from litigation against any other person for damages arising from the same harm. The parties to the settlement are also bound by the court's determination as to the net economic loss of the claimant. In such a settlement, net economic loss shall be paid periodically as costs are incurred, but the parties may agree to a lump sum settlement, subject to review by the court if the lump sum is $10,000 or more.

If the defendant rejects the claimant's settlement offer, and then has judgment entered against it in an amount equal to or exceeding the settlement offer, it would be liable for the claimant's reasonable attorney's fees and costs from the time the offer is rejected until the entry of judgment. This penalty shall not exceed $100,000, and shall be reduced by the court if it finds that there was a reasonable basis for rejection of the settlement offer because the case involved a novel question of law or complex question of fact.

If a defendant makes an offer and the claimant rejects it, that defendant's liability for the claimant's economic loss would be limited to net economic loss. Liability for noneconomic losses (excluding puntitive damages) could not exceed $250,000 in cases where the court finds that dignitary loss for severe, permanent injuries is appropriate. In all other cases, if the settlement offer is rejected by

the claimant, the limit on the claimant's noneconomic loss would be twice the claimant's economic loss award or $50,000, whichever is less.

If the recipient of the settlement offer disputes whether the severity of the claimant's harm warrants the inclusion or exclusion of the dignitary loss payment of $100,000, this question shall be resolved within 15 days by the court. If the court finds that the offer is invalid because it excludes or includes the payment of dignitary loss, the offeror has ten days in which to make a new offer in compliance with the court's finding. If the initial offer is found to be valid, the penalties and limitations outlined above are applicable if the offer is subsequently rejected.

Responsibility of Product Sellers

In any product liability action, a product seller is liable if the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of the claimant's harm. Where, however, the manufacturer is not subject to service of process or is determined to be judgment-proof, the seller may be responsible for harms attributable to the manufacturer.

Punitive Damages

Puntitive damages may be assessed if the claimant proves liability for compensatory damages and establishes by clear and convicing evidence that the harm suffered was the result of conduct manifesting a conscious, flagrant indifference to the safety of persons who might be harmed by a product.

Punitive damages may not be imposed upon manufacturers or product sellers for harm caused by prescription and over-the-counter drugs, medical devices and aircraft, when the safety of those products has been approved by the appropriate federal agency prior to the marketing of the product. This defense is not available, however, to any defendant who has committed fraud during the approval or review process by withholding or misrepresenting relevant information.

Uniform Time Limitations on Liability

A two-year statute of limitations for filing complaints in all product liability actions is provided, which does not begin to run until the claimant discovers or should have discovered both the claimants harm and its cause. This "discovery rule" is more favorable to claimants than the "time of injury rule" followed by some States.

If a product is a capital good, no claim may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling or leasing the product. Capital good is defined as a product used in trade or business or held for the production of income. This 25-year statute of repose for capital goods does not apply to cases involving toxic harm.

With respect to products which are not capital goods, a manufacturer is not liable for harm which occurs after the product's useful

safe life, unless (1) the manufacturer warranted that the product can be used safely for a longer period, (2) the manufacturer's intentional misrepresentation of facts about the product was the proximate cause of the claimant's harm, or (3) the harm was caused by exposure to a product within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life. There shall be a rebuttable presumption that a product's useful safe life is 10 years from the time of delivery.

The statute of repose for capital goods and the uniform time limitation on liability based on the useful safe life of other products is not applicable to motor vehicles, vessels, aircraft, or railroads used primarily to transport passengers for hire.

Counsel's Liability for Excessive Costs

Penalties may be imposed on attorneys who act in bad faith or with intent to delay, who file suit for purposes of achieving settlement where there was no reasonable basis for recovery, or who defend suits without a good faith belief that there was a reasonable basis for such defense. Such attorneys shall be liable for all the costs reasonably attributable to such conduct, including court costs, fees, expenses, and attorney's fees.

Record Retention

Any claimant and any person who is a party or who anticipates being a party to a particular product liability action shall retain all material relevant to the claim or action. Any party to a civil action who willfully destroys, conceals, or alters any relevant materials shall be fined not less than $1000 and ordered to pay the other party's costs, including attorney's fees, incurrred in proving the violation, and there shall be a rebuttable presumption that the facts to which the record related are adverse to the position of the party who committed the violation. If a party nonwillfully engages in such conduct, the court may, in the interest of justice, establish a rebuttable presumption that the facts to which the unavailable material related are adverse to the position of that party.

Workers' Compensation Offset

Damages in a product liability action shall be reduced by the amount paid to the claimant under any state or Federal worker's compensation law. This reduction does not affect the actual amount the claimant receives in damages today, and it reflects the practical effect of current law in virtually all jurisdictions. The employer's subrogation lien is automatically eliminated unless the manufacturer or product seller had expressly agreed to indemnify the employer. The employer's liability is limited to workers' compensation benefits paid to injured workers; thus, the workers' compensation system is protected from indemnity or contribution claims by manufacturers.

Several Liability for Noneconomic Damages

In any product liability action with more than one defendant, each defendant's liability for noneconomic damages shall be limited

to the defendant's percentage of responsibility as determined by the trier of fact. This provision addresses the so-called "deep pocket" problem , which makes even a minimally responsible defendant fully liable, under the doctrine of joint and several liability, for the claimant's entire damage award.

Forum Non Conveniens

Any court decline to exercise jurisdiction over a product liability action if the court determines that the convenience of the parties and the interests of justice dictate that the action should proceed in another jurisdiction. In any action maintained by a foreign citizen which arises out of a transaction which occurred in a foreign jurisdiction, there is a presumption, rebuttable by clear and convincing evidence, that the action should proceed in a foreign jurisdiction.

Admissible Evidence

All relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or undue delay, or if the evidence is excludable under State rules of hearsay or privilege. Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is not admissible in court to prove liability. This preserves the incentive for manufacturers and product sellers to improve their products.

Defense Involving Intoxicating Alcohol or Drugs

No plaintiff may recover for harm caused by a product if the claimant was under the influence of alcohol or any drug and such condition was more than fifty percent responsible for the claimant's harm. Determinaton of whether a person was under the influence of alcohol shall be made pursuant to applicable state law.

Product Liability Insurance Reporting

Each year, the Secretary of Commerce shall provide to the Congress a report analyzing the impact of this Act on insurers which issue product liability insurance either separately or in conjunction with other insurers, and on self-insurers, captive insurers and risk retention groups. The Secretary shall collect from each insurer all data the Secretary considers necessary, but to the maximum extent practicable, shall obtain such information from existing sources, such as State insurance commissioners, recognized insurance statistical agencies, the Administrative Office of the United States Courts, and the National Center for State Courts. The Secretary may subpoena witnesses and records related to this report from any place in the United States.

ESTIMATED COSTS

The cost impacts of the bill are summarized in the Congressional Budget Office cost estimate below, submitted in accordance with paragraph ii(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974. The Com-

mittee believes that this cost estimate should be viewed in the following context.

Section 307(c) of the bill would prohibit any "employer" (or its workers' compensation insurer, if any) from pursuing a subrogation lien against a manufacturer or product seller to recover the workers' compensation benefits paid to the employer's injured worker. The term "employer" would include the Federal Government, because the bill does apply to the Federal Employees Compensation Act (FECA).[63]

As a consequence, the Federal Government's workers' compensation program, established under FECA, would be prohibited from seeking to recover FECA benefits paid to a Government employee injured in a product-related workplace accident. However, the Federal Government could continue to seek subrogation recoveries in workplace accidents in which no product was involved. For example, if a postal worker was injured in an automobile accident or bitten by a homeowner's dog in the course of the postal worker's delivery rounds, FECA could seek to recover the benefits paid to the injured worker from the insurer of the nongovernment vehicle or the homeowner's liability insurer.

According to the Department of Labor, FECA recovers approximately $9 million on an annual basis in subrogation actions against third parties responsible for the Government workers' injuries or diseases. There is no breakdown available, however, as to what percentage of this subrogation recovery comes from cases involving products. Although there would be some loss to the Federal Government in product liability cases, the actual amount has not been determined, and the $9 million total figure cannot be used to estimate this loss.

Moreover, the loss of such FECA subrogation rights must be considered in the context of the Supreme Court's decision in *Lockheed Aircraft Corp.* v. *United States.* 460 U.S. 190 (1983). In this case, the Supreme Court ruled that FECA's exclusive liability provision did not bar manufacturers' indemnity claims against the Federal Government under the Federal Tort Claims Act; if the applicable State law permits manufacturers to bring indemnity claims against employers, such claims are not barred by FECA.

Section 307(d) of the bill would end the ability of product manufacturers and sellers who have been forced to pay damages in product liability actions to maintain any action for implied indemnity or contribution from any employer, when the injured person is entitled to workers' compensation benefits under State or Federal law. this provision would bar in product liability actions the third party recovery from the Federal Government permitted by the *Lockheed Aircraft* decision.

The Congressional Budget Office notes that this provision would result in some savings for the Federal Government, but has been unable to assess fully the extent to which such savings would offset the loss of subrogation recoveries. According to the Justice Department's Civil Division, approximately 100 suits against the Federal Government by third party product liability defendants are pending. The amount of recovery being sought has not been estimated, but it is anticipated that the savings produced by section 307(d)

could be substantial and that this provision could significantly limit the liability of the Federal Government in future litigation.

The cost estimate of the Congressional Budget Office is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 15, 1986.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached revised cost estimate for the Product Liability Reform Act.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2760.
2. Bill title: Product Liability Reform Act.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, June 26, 1986.
4. Bill purpose: The bill would establish a uniform products liability law. The bill defines the responsibilities of manufacturers and product sellers and establishes an expedited procedure for setting product liability disputes. In cases where the bill establishes a rule of law on an issue, it would preempt state laws on product liability. The bill would set uniform standards of product seller liability and for punitive damage awards and establish incentives for plaintiffs and defendants to avoid a trial. The bill also keeps the worker's compensation system and the tort liability system separate in cases involving both work injury and product liability by barring (1) suits by an employer or its workers' compensation insurance carrier against a manufacturer or product seller to recoup funds paid in worker compensation cases, (2) employer liens against claimants' recoveries, and (3) suits by third parties against negligent employers to recover monies paid in product liability judgments. In addition, the bill would establish insurance data reporting requirements.
5. Estimated cost of the Federal Government: The bill would require additional spending by the Department of Commerce, which would be subject to appropriations action. These costs are shown below.

[By fiscal year, in millions of dollars]

	1987	1988	1989	1990	1991
Estimated authorization level	1	1	1	1	1
Estimated outlays	1	1	1	1	1

The bill would also result in increased costs under the Federal Employees Compensation Act (FECA), but CBO does not have sufficient data at the present time to estimate such costs precisely. Based on historical FECA data, these costs are estimated to be less than $9 million annually.

The costs of this bill fall within various budget functions.

Basis of Estimate:

Based on information from the Department of Commerce, CBO estimates that the provision requiring product liability insurance data reporting would result in costs of about $1.3 million per year.

In addition, the bill would increase costs to the federal government by terminating an injured federal employee's obligation to sue in third party product liability claims as a condition of receiving worker compensation. Under current law, a federal worker injured in a work-related accident in which there is a third party product liability must sue the responsible third party for injury-related damages as a condition for receiving benefits under the Federal Employees' Compensation Act (FECA). Upon recovery of any damages through litigation, the injured individual must then reimburse the FECA program for benefits received. In most cases, by the time any damages have been recovered, the federal agency for which the injured individual worked has reimbursed the FECA program for the payment of benefits. Such damages remitted to FECA are credited to the federal agency's account, offsetting that agency's future obligations to FECA. A Labor Department review of April 1984–June 1986 FECA claims showed that about $9 million annually was recovered through actions brought by injured federal workers against third parties. CBO is presently unable to determine, however, the portion of this amount that would be lost to the federal government through the termination of the responsibility to bring suit in product liability cases. Because the recovery of such damages directly offsets FECA obligations, their loss would result in an increase in budget authority and outlays in some amount less than $9 million annually.

The bill would also end the ability of product manufacturers and sellers who have been forced to pay damages in product liability actions to injured federal workers to sue the federal government as an employer, thus eventually resulting in some savings. Until 1983, the federal government successfully argued that FECA's exclusive liability provision protected it from such actions. However, in Lockheed Aircraft Corporation v. the United States, 103 S.Ct. 1033 (1983), it was held that FECA's exclusive liability provision did not bar third party liability defendants from seeking indemnity actions against the United States as an employer. According to the Justice Department's Civil Division, less than 100 suits against the federal government brought by third party product liability defendants are pending. However, the breadth of application of the Lockheed decision has not been fully established, and there is usually a lag between the time of such landmark cases and the generation of cases based upon such decisions. The Lockheed decision could eventually cause a substantial number of such cases, which would be preempted by this bill, but insufficient information is available to estimate

the savings to the federal government that would be realized if the bill were enacted.

6. Estimated cost to State and local governments: The provisions in this bill regarding workers' compensation actions would affect the budgets of state and local governments in much the same way as they affect the federal budget. The bill's prevention of suits by (1) employers of injured workers against manufacturers or sellers of products responsible for the injury and by (2) third parties successfully sued by injured individuals against those individuals' employers could have an impact on state and local government budgets, and the size of the effect is uncertain.

All states currently permit employers, including state and local governments, to sue the firm or firms involved in producing or selling a faulty good after having paid benefits on a workers' compensation claim involving product liability. The elimination of this subrogation lien would preclude state and local governments from recovering monies they currently collect and would thereby cause net budgetary increases.

However, according to the Justice Department, most states also permit third party tortfeasors to sue negligent employers to recoup part or all of product liability judgments. Preventing this type of action could result in savings to state and local governments when they are defendants in such suits.

Because all states permit the first type of litigation, which results in savings to state and local governments, and some states prohibit the second type, which results in costs, it is probable that prohibiting both types of actions would result in net costs for state and local government budgets. However, enactment of this bill would result in a reduction in the workloads of state courts due to the effects of the expedited claims settlement procedures. Insufficient information is available to estimate the savings and costs associated with prevention of these kinds of suits.

7. Estimate comparison: None.

8. Previous CBO estimate: This estimate supersedes the previous cost estimate for this bill, dated July 28, 1986.

9. Estimate prepared by: Marge Miller.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of this legislation.

The purpose of this product liability reform legislation, as reported, is to provide greater certainty as to the rights and responsibilities of all those involved in product liability disputes, to reduce transaction costs, and to relieve the burden imposed on interstate commerce by the present product liability litigation system. This legislation does not change the jurisdiction of State or Federal courts, but makes a number of significant reforms that are applicable to product liability actions.

It is anticipated that this legislation will result in substantial cost and paperwork savings to all parties affected by product liabil-

ity lawsuits. First, the legislation will bring greater predictability to this area of the law, and, thus, save time and money for manufacturers, product sellers and consumers alike, each of whom will be able to determine their rights more readly than under current law. Moreover, the provisions of this legislation will promote early settlement of product liability disputes, thus reducing the enormous costs of product liability litigation, which are ultimately passed on to the consumer.

The Committee does note, however, that while overall this legislation will bring about significant cost savings, the insurance reporting requirements of title IV of the bill will have some regulatory impact. Title IV would impose new responsibilities on the Department of Commerce with respect to insurance data collection, at some cost to the Federal Government. This title of the bill directs the Secretary of Commerce to provide Congress with an annual report analyzing the impact of this legislation on insurers which issue product liability insurance either separately or in conjunction with other insurers, and on self-insurers, captive insurers and risk retention groups. The Secretary is directed to collect from each insurer all data the Secretary considers necessary for this analysis.

Section 401 also directs the Secretary to issue regulations as to the reporting and collection of insurance data for the purposes of title IV. The bill mandates that these regulations shall require the reporting of information sufficiently comprehensive to make possible a full evaluation of the impact of this legislation on insurers. These regulations must specifiy the information to be provided by such insurers and the format of such information, taking into account methods to minimize the paperwork and cost burdens of such insurers and the Federal Government. These regulations shall provide, as well, that to the maximum extent possible such information is to be obtained from existing sources, such as State insurance commissioners, recognized insurance statistical agencies, the Administrative Office of the United States Courts, and the National Center for State Courts.

In light of these regulatory guidelines, the Committee does not anticipate that the insurance reporting requirements of this legislation will impose a significant regulatory burden on insurers. Nor does the Committee believe that any impact on the privacy or the paperwork requirements of individuals or businesses will be unduly increased. However, the Committee recognizes that to a large degree the impact of title IV will depend on the adherence of the Secretary of Commerce to the requirement that data from existing sources should be utilized to the maximum extent possible.

Section-by-Section Analysis

SECTION 101—SHORT TITLE

As reported

Section 101 states the short title of the legislation, providing that the legislation may be cited as the Product Liability Reform Act".

SECTION 102—DEFINITIONS

In general

Section 102 defines terms or phrases used in the bill. Whenever a defined term or phrase is used, reference should be made to the definition in section 102.

As reported

Section 102(a) defines the following terms:

(1) Claimant.[64]—As used in the act, a "claimant" is any person who brings a product liability action and any person on whose behalf such an action is brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's decedent. If a product liability action is brought through or on behalf of a minor, a claimant includes the minor's parent or guardian.

(2) Clear and convincing evidence.—The bill adopts the generally accepted definition of clear and convincing evidence.[65] This is a degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of allegations sought to be established. The clear and convincing evidence standard requires more proof than the preponderance of the evidence standard and less proof than the beyond a reasonable doubt standard.

(3) Collateral benefits.—This term includes all benefits and advantages received or entitled to be received by any claimant harmed by a product, under any federal or state law (other than through a claim for breach of an obligation or duty), or any life, health or accident insurance or salary continuation plan. The term also applies to such other benefits as disability income or replacement services insurance payments, or any benefit received or to be received as a result of participation in any pre-paid medical plan or Health Maintenance Organization.

Collateral benefits include all such benefits regardless of any right any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien, or otherwise. Such collateral benefits paid or payable to a claimant by reason of the same harm are used to calculate the claimant's "net economic loss" for the purposes of the settlement scheme established by title II of this bill.

(4) Commerce.—This definition covers the full extent of the Congress' powers to regulate and promote interstate commerce.[66]

(5) Commercial loss.—This term applies to economic injury, whether direct, incidental, or consequential, including property damage and damage to the product itself, incurred by persons regularly engaged in business activities consisting of providing goods and services for compensation. A civil action for commercial loss is not subject to this bill and is to be governed by applicable commercial or contract law.

(6) Dignitary loss.—For purposes of title II's expedited settlement system, "dignitary loss" means non-economic loss resulting from harm caused by a product, compensable under state law, and consisting of pain and suffering or mental anguish associated with "(A) the death of a parent, child or spouse; (B) serious and permanent disfigurement; (C) permanent loss of a limb or organ; or (D) serious

and permanent impairment of a bodily function." Dignitary loss is limited by definition to $100,000.

The elements of title II expedited settlement offer are limited to payment of the claimant's net economic loss—those actual expenses not reimbursed by other sources—and $100,000 for such dignitary loss. In cases where the claimant has not suffered such servere, permanent injury, dignitary loss is not an appropriate element of the settlement offer; the settlement offer may be limited to net economic loss.[67]

It is anticipated that in most cases there will be no question as to whether the claimant has suffered server and permanent loss that can be characterized as dignitary loss. In those cases, however, where a recipient of a settlement offer disputes the validity of a settlement offer because of the inclusion or exclusion of dignitary loss, the recipient shall by motion seek an expedited determination by the court as to whether the claimant has suffered dignitary loss. Moreover, in those cases in which a defendant's title II settlement offer has been rejected by a claimant, the court shall make a determination as to whether dignitary loss is appropriate in order to determine the limitation on the defendant's liability for non-economic loss.[68]

The Committee wishes to stress the special nature of dignitary loss, which must be considered by the court in making such determinations. Dignitary loss does not exist in the great majority of cases, but only those extreme cases involving the most severe and serious harm to claimants.

As guidelines for such determinations, the Committee notes that, in the bill's definition of dignitary loss, the term "serious and permanent disfigurement" means a deformity or extensive scarring that is both serious and permanent. The phrase "loss of limb" refers to an arm, hand, leg, or foot; fingers and toes, alone, are not to be treated as limbs for the purposes of this definition. The term "organ" means a body part that performs a function, such as a kidney or an eye. Partial loss of an organ, such as a lung would not, in itself, be considered as a dignitary loss.

In addition, the term "serious and permanent impairment of a bodily function" includes only those bodily functions that are significant. Such impairments must significantly affect the ability of the claiment to resume the claimant's usual and customary daily activities. The terms includes, for example, loss of reproductive capacity, loss of the ability to walk, loss of hearing, and loss of sight. This list is not exhaustive, but it indicates the types of serious and permanent impairment of bodily functions that would qualify as dignitary loss.

The Committee recognizes, too, that in some cases, consideration may have to be given to a combination of the various elements of the bill's definition of "dignitary loss." The Committee stresses, however, that in such consideration the finding that dignitary loss is appropriate is warranted only when the cumulative impact of these elements is severe.

In expedited settlements pursuant to title II, the claimant's recovery for any such dignitary loss is limited by definition of the flat sum of $100,000 in all cases. It has been suggested that the expedited settlement system ought to distinguish more precisely be-

tween different levels of injury, and adjust levels of payment accordingly. But finer distinctions, which attempt to measure more precisely the individual victim's degree of pain and suffering, have been attempted, both under state tort laws (which generally leave determination of the amount to the jury with no guidance whatsoever) and under many state worker's compensation statutes (which have set forth detailed schedules of compensation for various kinds of noneconomic injury). In both cases, the attempt to determine the precise degree of the victim's injury has generated extensive litigation and delays with excessive transaction costs.[69]

In Florida, for example, disputes over the proper evaluation of disability consumed 79 percent of administrative and legal time until the workers' compensation system was reformed in 1979. Florida now measures disability in terms of actual wage loss, rather than in terms of scheduled amounts which are often unrelated to pecuniary loss. This has made compensation dollars available for other injuries.[70]

The Committee recognizes the inherent difficulty in measuring pain and suffering.[71] It is questionable whether it is ever possible to compensate someone for their pain and suffering. As the U.S. Supreme Court has written, "physical suffering must be borne by the [plaintiff] alone; the laws of nature prevent this from being evaded or shifted to another."[72] But there are cases, comprising a small fraction of product liability actions, in which the victim's injuries are so severe that moral sensibilities seem to demand some compensation for pain and suffering in addition to economic loss. In such cases, where the victim is mutilated, crippled, or disfigured, no amount of money can be enough to replace what has been lost, yet recovery for dignitary loss is appropriate and a figure must be set.

The $100,000 provided by the title II expedited claim system for dignitary loss is an attempt to establish such a figure. It has been criticized as arbitrary, but recovery on an expedited basis of such a sum for pain and suffering must be compared to the recovery available under the present product liability system, in which the average victim of severe injury now faces years of litigation and the possibility of receiving little if anything for pain and suffering. As noted previously, while some victims receive full economic compensation and something for pain and suffering, as well, studies have shown that the average compensation for the most seriously injured victims is actually *less* than their economic loss.[73] In contrast, S. 2760 would encourage settlement of such cases for the plaintiff's full economic loss plus $100,000 for dignitary loss. This reform can only help the most seriously injured victims.

The title II settlement system limits recovery for pain and suffering to cases involving dignitary loss. There is no such recovery provided for the less serious cases; however, in such less serious cases today, pain and suffering awards are used generally by juries as a roundabout way of compensating the claimant for the claimant's attorney's fees.[74] In addition, it has been noted that "[i]f successful personal injury plaintiffs should be awarded a reasonable sum for legal expenses . . . a pain and suffering recovery is a clumsy substitute."[75] A plaintiff's pain and suffering award may not bear any relation to the plaintiff's legal expenses. If such expenses are to be

compensated, it makes more sense to do so directly, as is done in the expedited settlement system, which includes reasonable attorney's fees related to the settlement as a compensable element of the claimant's net economic loss.[76]

(7) *Economic loss.*—This term means any pecuniary loss resulting from harm which is allowed under state law. The essential distinction between economic and noneconomic loss is that the amount of the plaintiff's economic loss is subject to empirical measurement and confirmation. In contrast, there is no standard at all for measuring a plaintiff's pain and suffering.[77]

(8) Exercise of reasonable care.—This concept is one with which courts have dealt for decades. The definition is based directly on section 283 of the Restatement (Second) of Torts and the accompanying comments, which refer to the "reasonable man" standard. The "reasonable man" denotes a "person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interest of others." [78]

(9) Harm.—The bill provides that a claimant may bring a civil action for "harm" caused by a product, against the product's manufacturer or product seller. Harm is limited to injury or damage recognized under applicable state law, and does not include loss of damage caused to a product itself or commerical loss. Therefore, damage to the product itself of commercial loss is not a compensable harm under the bill.

Direct economic loss, i.e., damage to the product itself, traditionally has been left to commercial or contract law, under which a purchaser has a right of action for out-of-pocket losses relating to the value of a product.[79] In addition, indirect economic losses caused by damage to the product itself, i.e., commercial losses, are not compensable harms under the bill. Indirect economic losses include, for example, loss of profits due to an inability to use the damaged product. Under the majority case law which follows *Seely* v. *White Motor Companay* [80] and the Supreme Court's decision in *East River Steamship Corp.* v. *Transamerica Delaval, Inc.*,[81] (admiralty case) recovery for such losses is left to commercial law and the Uniform Commercial Code. These losses are, in essence, contract damages and not tort damages.[82] They arise in the course of commerical dealings and can be resolved through contracts and claims based on those contracts.

Such claims for direct or indirect economic loss are not claims for "harm" caused by a product. Under the Uniform Commercial Code and other contract law, recover is available for economic losses. It is the Committee's intent that where recovery is not allowed because of a statute of limitations defense or other defenses to contract liability, this bill will not create an independent cause of action. For example, a claim for commercial loss could not be brought under the Product Liability Reform Act if recovery under state contract or commercial law is barred because of the statute of limitations, contractural disclaimers or limitations of remedies. If the claim is for damage to the product itself or for commercial loss, a civil action cannot be brought under this legislation.

(10) Manufacturer.—A manufacturer means any person [83] engaged in a business to produce, create, make, or construct any

product [84] (or component part of a product) and who designs or formulates the product (or component part of the product) or has engaged another person to design or formulate the product or component part. The term does not include a person who only designs or formulates a product—such as an architect or engineer. These persons, although not liable under S. 2760, may be liable under traditional tort law for failure to exercise reasonable skill and care in rendering their design services.[85]

A product seller [86] may be a "manufacturer" of the product the product seller sells or otherwises places in the stream of commerce in two situations. First, the product seller is a "manufacturer" of a product with respect to all aspects of the product that are created or affected by this product seller's own conduct in designing, or formulating and producing, creating, making, or constructing as aspect of a product made by another. Where a product seller engages in such conduct before placing the product in the stream of commerce, the product seller is responsible for the consequences of that conduct as if the product seller were a manufacturer.

For example, a company may manufacture a truck and deliver it to a product seller. Prior to selling that vehicle, the product seller may design and create what becomes a new aspect of the truck by, for example, adding a larger engine or a cabin unit. The product seller is, then, the manufacturer of the end product with respect to all aspects of the product that are affected or created by the addition, Thus, the product seller is the manufacturer with respect to defects in the cabin unit itself and with respect to defects created by adding the unit to the original truck, such as lack of a warning back-up buzzer.[87] This rule fairly holds the product seller responsible for the consequences of the product seller's actions in designing and creating a new product from the original product; it is not intended to impose the manufacturer's liability on a product seller who merely cleans, paints, or reconditions the truck with parts that are designed or manufactured by someone else.

Second, a product seller is a manufacturer of a product where the product seller holds himself out as the manufacturer to the user of the product. Where a product seller attaches the product seller's own private label to a product made by another, the product seller's name and reputation become a representation of the product's quality in design and manufacture. The rule holding a product seller responsible for harms caused by products that the product seller "endorses" with the product seller's private label is uniformly followed by the States.[88]

(11) Net economic loss.—For purposes of title II, "net economic loss" includes reasonable expenses incurred for reasonably needed medical and rehabilitation care and services, lost income from work that the claimant would have performed, reasonable expenses incurred in obtaining ordinary and necessary family services that the claimant would have performed, lost earnings of a deceased person, and reasonable expenses incurred in preparation and submission of a settlement offer or a response to such an offer, including an attorney's fee. Net economic loss is intended to include such incurred losses that are not reimbursed by other sources; it is to be calculated by reducing such incurred losses by the total amount of

collateral benefits [89] paid or payable to the claimant by reason of the same harm.

A major element of a claimant's net economic loss is "reasonable expenses incurred for reasonably needed and used medical and rehabilitation care and services." Such medical expenses include, but are not limited to, expenses incurred for hospital services, physicians, surgeons, physiotherapists, nurses and licensed aide fees, medical supplies such as prescription drugs, professional ambulance service, laboratory tests, dental care for injury to teeth, anesthetics, plastic or cosmetic surgery required as a result of injury, blood and blood plasma, artificial limbs and eyes, surgical dressings, orthopedic appliances, wheelchairs and hospital beds.

Rehabilitation expenses include any expenses for reasonably needed care and services that are likely to contribute substantially to the restoration of the claimant's ability to resume his or her usual and customary daily activities, even though it will not necessarily enhance the claimant's earning capacity. Such expenses may include treatment at a rehabilitation facility, including the reasonable costs of adjustment and career counseling appropriate to the claimant's permanent and significant disability, if any. Such expenses may include, as well, such reasonable costs necessary to reequip the claimant's home for the claimant's disabilities, including reasonable costs for any remodeling and special equipment for transportation necessary because of the permanent and serious disability of the claimant.

(12) Non-economic loss.—This includes loss caused by a product other than economic loss or commercial loss.

(13) Person.—The act uses a broad definition of the term "person", which includes individuals, corporations, companies, associations, firms, partnerships, societies, and any other entities.

(14) Preponderance of the evidence.—This standard of proof is that used most often in civil litigation. It is a degree of proof which leads the trier of fact to find that a fact is more probably either true or untrue.[90]

(15) Product.—As used in the bill, a product is any object, substance, mixture, or raw material in a gaseous, liquid, or solid state (A) which is capable of delivery itself or as an assembled whole, in a mixed or combined state or as a component part or ingredient; (B) which is produced for introduction into trade or commerce; (C) which has intrinsic economic value; and (D) which is intended for sale or lease. The term does not include human tissue, blood, and organs unless specifically recognized as a product pursuant to state law.[91]

(16) Product Seller.—A product seller is any person engaged in business to sell, distribute, lease, prepare, blend, package, label, or otherwise place a product into the stream of commerce, or who installs, repairs, or maintains the harm-causing aspect of a product. The definition includes anyone in the chain of distribution, such as a wholesaler, distributor, or retailer.

A seller of real property is not a product seller under this bill and, therefore, tort suits against a person who sells real property will be governed by State tort or real estate law.[92]

A person who provides professional services is not a product seller where the essence of the transaction is furnishing judgment,

skill, or service and the sale or use of a product is only incidental. This follows the law of the majority of States. Where, for example, an engineer, pharmacist, optician, or physician provides or uses a product in connection with that person's professional services, the person is not a product seller.[93] As a professional, the person is required to exercise reasonable care, prudence, and skill in rendering services. Where failure to do so results in harm, injured persons have remedies under traditional State tort law theories and do not have a claim under this bill.

If, however, a professional engages in a commercial transaction where the essence of the transaction is not the furnishing of professional skill and judgment, the professional may be a product seller. For example, a pharmacist who sells perfume or photographic film may be a product seller within the scope of the bill. In such a case, the sale rather than the exercise of professional skill is the essence of the transaction.

A product lessor is not a product seller if (1) the product lessor acts only in a financial role in the sale or distribution of the product, and (2) the product lessor has no control over the lease arrangement. Such a person, called a "financing lessor", generally has no contact with the product and does not provide advice about the product or its selection. Such a person merely provides the money to transfer the product to the lessee. The cases that have considered the issue uniformly hold that financing lessors are not product sellers.[94]

(17) State.—This definition is broad and includes the District of Columbia, all the States, territories, and possessions of the United States, and any political subdivision thereof.

Section 102(b) of the bill further specifies several of the components of net economic loss and the method for calculation of such loss. Lost income compensable as net economic loss shall be reduced by the amount of all taxes which would be applicable to such income, but which would not be applicable to compensation paid under this legislation. Moreover, in calculating net economic loss, where the amount of benefits (including workers' compensation benefits) from any other source cannot be determined reasonably within the time prescribed by the bill for payment of net economic loss, the defendant manufacturer or product seller shall place in an escrow account that portion of the economic loss which the manufacturer reasonably anticipates the claimant will receive from such other sources, until the claimant's right to such benefits has finally been determined.

Those attorney's fees compensable as net economic loss may be on a contingent basis but, for purposes of determining net economic loss, shall be calculated solely on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and the complexity of the case.

Except as otherwise provided by any provision of Federal law,[95] no program of compensation, whether public or private, the benefits of which would be deducted from a claimant's economic loss in order to calculate net economic loss, may make payment of benefits secondary to payment of net economic loss by a defendant under this legislation.

SECTION 103—PREEMPTION

In general

Section 103 provides that the bill governs any civil action brought against a manufacturer or product seller for harm caused by a product and that the bill supersedes State law to the extent that it establishes a rule of law applicable to recovery in such actions. When a rule of law is not established by the bill, the issue is left to applicable State law.

Present law

The law governing the liability of manufacturers of products, who routinely sell products across state lines, is presently governed by state law. The inefficiency and unpredictability of the law as it is presently administered has become a major burden on interstate commerce. The bill seeks to simplify the law and reduce the costs and unpredictability of the system.

Congress has the power under the Commerce Clause of the Constitution to enact a Federal product liability statute that preempts State law. "Any such legislation would offend neither the Tenth Amendment's recognition of state sovereignty . . . nor the Fifth Amendment's traditional notions of due process and equal protection."[96]

As reported

Section 103(a) states that this bill governs any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product. Consistent with the definition of "harm" set forth in section 102(a)(9), section 103 states that a civil action for loss or damage to the product itself or for commercial loss is not a product liability action subject to this bill, but is governed by applicable commercial or contract law. This follows traditional law, which leaves recovery for purely commercial losses to actions founded on commercial law.

Section 103(b) provides that the bill supersedes State law regarding recovery for harm caused by a product only to the extent that the bill establishes a rule of law applicable to an action for such recovery. Any issue arising in an action governed by this legislation that is not governed by a rule of law established by the legislation shall be governed by applicable State common and statutory law.[97]

As has been noted, the Commerce Clause of the Constitution[98] gives Congress the power to enact a uniform Federal product liability act.[99] The Supremacy Clause of the United States Constitution also gives Congress the power to enact a Federal law that replaces State law in the area of product liability.[100] The fact that tort law is traditionally a matter of State law does not alter this rule, and Congress has enacted a number of statutes that preempt State tort law.[101]

Section 103(b) is intended to ensure that the rules set forth in the bill are uniformly applied in all product liability actions, regardless of where the harm occurred and which court hears the claim. Under the Supremacy Clause, State courts are bound to apply Federal law,[102] and it is expected that State and Federal courts with

jurisdiction over product liability actions will follow Federal precedent and will interpret the bill in a manner consistent with the intent of Congress.

However, section 103(b) also makes clear that where the bill does not establish a rule of law, State law will apply. Recently, a number of state legislatures have considered the question of tort liability, including product liability, and some have adopted measures dealing with this matter. It is not the Committee's intention that this legislation preempt such state legislation—or any other rule of State law—that provides for defenses, places limitations on the amount of damages that may be recovered, or covers other topics that are not addressed by a rule in this bill. For example, the bill establishes certain rules of liability for product sellers. Those rules supersede state law. With respect to other issues regarding the liability of product sellers not covered by the bill, such as contributory versus comparative fault, state law applies.

Likewise, in applying this provision with respect to the expedited settlement provisions of title II of this bill, the Committee does not intend the legislation to supersede state law limitations on liability that are not governed by the bill. When the claimant has rejected a title II settlement offer made by the defendant, then the bill limits the claimant's recovery for non-economic damages from the defendant to $50,000 or $250,000, as applicable, regardless of whether State law provides for a higher or a lower limit on non-economic damages. This is because this bill provides a rule of law, i.e., the limit on non-economic damages, which preempts State law. In those instances, however, where there is no title II settlement offer or where the defendant has rejected such as offer made by the claimant, any limits on non-economic damages applicable under State law are not preempted because this bill does not provide an applicable rule of law.

Section 103(c) lists a number of laws that are not superseded or affected by the bill. the bill does not waive or affect the defense of sovereign immunity of any State or of the United States. the legislation does not affect any provision of the Foreign Sovereign Immunities Act of 1976. Nothing in the bill shall be construed to supersede any Federal law except the Federal Employees Compensation Act.[103] the bill does not preempt State choice-of-law rules with respect to claims brought by a foreign nation or a foreign citizen. Except as provided in section 309, venue and forum non conveniens rules are not affected.

Nor does the bill supersede any statutory or common law, including an action to abate a nuisance, that authorizes a state or person to institute an action for civil damages or civil penalties, clean-up costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat of such contamination or pollution. Such actions involve separate policy considerations and relate to acts that are different from the acts for which this bill provides rules of law. It is possible that the same event or conduct may give rise to both a product liability action governed by this bill and an action relating to contamination or pollution of the environment. The two types of actions could be alleged as separate counts in a

single complaint and may or may not be alleged against the same defendant.

Section 103(d) provides that as used in this section, "environment" shall have the same meaning given to this term in section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 (14)).[104]

Section 103(e) requires that this bill be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions. Disputes over the correct interpretation of specific provisions of the legislation should be resolved with reference to this report and other statements of intention that are recorded during the legislative process.

SECTION 104—JURISDICTION OF FEDERAL COURTS

As reported

Section 104 provides that the bill does not provide any new basis for Federal court jurisdiction. The resolution of product liability claims is left to State courts or to Federal courts that currently have jurisdiction over those claims.

Specifically, section 104 states: "The district courts of the United States shall not have jurisdiction over any civil action pursuant to this Act, based on sections 1331 or 1337 of title 28, United States Code." These sections of the United States Code establish district court jurisdiction with respect to federal questions and acts of Congress regulating commerce; it is the intent of the Committee that these section shall not be a basis for bringing a product liability action governed by this bill in federal court.

Civil actions governed by this bill will continue to be handled by state courts currently open to litigants and only by Federal district courts where there is currently a basis for Federal jurisdiction.[105] The bill does not affect these bases for jurisdiction and, therefore, does not expand the caseload of the Federal courts.

SECTION 105—EFFECTIVE DATE

As reported

Section 105(a) provides that the bill shall be effective 90 days after its enactment and shall apply to all civil actions governed by the bill commenced on or after that date, including any action in which the harm or the conduct which caused the harm occurred before the effective date. Applying the statute to all claims filed after the effective date, regardless of when the harm occurred, allows all parties and courts to know precisely what law applies in a product liability action.

Section 105(b) provides that if any provision of the bill would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring an action within one year after the effective date of the legislation. This exception is intended to prevent unfair situations from arising as a result of the application of the time limitations set forth in section 304.

TITLE II

Title II of the bill establishes a scheme for expedited settlement of product liability claims in the initial stages of litigation. This scheme is based on incentives for settlement that will reduce the delays, excessive transaction costs, and uncertainties associated with such claims.

Most product liability claims are settled, but often after long and costly litigation.[106] Moreover, as has been shown, such litigation results in unpredicatable and inequitable recovery, particularly for those with the largest losses.

By encouraging early settlements measured in terms of the claimant's net economic loss and any dignitary loss, title II will ameliorate the present product liability system's inequitable pattern of overcompensating those with minor injuries and undercompensating the victims of the severest injuries. Victims of product-related injuries will benefit by receiving a fairer level of compensation more quickly. All those involved in product liability disputes will no longer have to bear the present system's huge transaction costs, which now consume more than half of the money that is spent in resolving product liability claims. Moreover, the incentives for settlement include uniform limitations on liability that will provide greater predictability for defendants in product liability cases.

SECTION 201—EXPEDITED PRODUCT LIABILITY SETTLEMENTS

In general

Section 201 sets forth rules governing the expedited settlement procedure. A claimant in a civil action governed by this bill may include in the complaint an offer to settle for net economic loss and, if appropriate, dignitary loss. If such an offer is not included in the complaint, any defendant may make such a settlement offer within ninety days after service of the claimant's complaint or within the time permitted pursuant to applicable State or Federal law for the responsive pleading, whichever is longer.

The recipient of such an offer must respond within ninety days, unless the recipient disputes the validity of the offer because of the inclusion or exclusion of dignitary loss, or unless this time period is extended by the court for discovery. In the event of a dispute as to the dignitary loss element of the settlement offer, the recipient shall file a motion for the court to determine the validity of the offer. If the court finds that the offer is invalid, a new offer consistent with the court's determination may be made within ten days. When an expedited settlement offer has been made, the court may, upon timely motion, extend the response period for up to ninety days to allow discovery. Any dispute involving the amount of net economic loss to be paid as part of the settlement shall be resolved by the court, unless the parties agree to be bound by determinations made pursuant to established voluntary alternative dispute resolution procedures.

As reported

Section 201(a) provides that any claimant may bring a civil action for harm caused by a product against the product's manufac-

turer or the product seller, pursuant to applicable state or Federal law, except to the extent such law is superseded by this bill. With respect to title II, this means that product liability actions brought against the manufacturer or product seller will be subject to the expedited settlement procedures

As reported

Section 201(a) provides that any claimant may bring a civil action for harm caused by a product against the product's manufacturer or the product seller, pursuant to applicable state or Federal law, except to the extent such law is superseded by this bill. With respect to title II, this means that product liability actions brought against the manufacturer or product seller will be subject to the expedited settlement procedures established by the bill. No new liability standards are imposed by title II; however, as an alternative to litigation under existing standards of responsibility, all parties to such actions against product manufacturers and sellers will have the opportunity to settle their disputes on an expedited basis and on the terms set forth in this title.

Section 201(b) states that any claimant may, in addition to any claim for relief made in accordance with State law, include in the complaint an offer of settlement for the claimant's net economic loss[107] and any dignitary loss.[108] Such an offer of settlement need not specify the amount of the claimant's net economic loss, since the offer is essentially an offer to accept payment for those incurred losses that are not reimbursed by other sources. If the offer is accepted, the claimant has a right to full reimbursement of net economic loss as incurred and, when appropriate, $100,000 for dignatory loss. Pursuant to section 205, the claimant and the defendant also have the option of entering into a final settlement for a lump-sum amount or for a fixed amount to be paid on a periodic basis.

Section 201(c) provides that any defendant also may make such an offer of settlement for net economic loss and any dignitary loss. Such an offer shall be made by certified mail, return receipt requested, within ninety days after service of the claimant's complaint, or within the time permitted pursuant to applicable State or Federal law for a responsive pleading, whichever is longer. If such pleading includes a motion to dismiss in accordance with applicable law, the defendant may make such an offer to the claimant within ten days after the court's determination regarding such a motion. A defendant who makes an offer of settlement shall file a copy of such offer with the court during the applicable time period for making the offer.

A defendant may make such an offer of settlement only if the claimant has not included a settlement offer as part of the complaint. If the claimant has made a settlement offer, the defendants as recipients of the offer must determine, pursuant to section 201(d), whether to accept the offer, reject it, or challenge its validity.

Section 201(d) provides that the recipient of an offer of settlement shall determine whether to accept or reject such an offer, unless the recipient disputes the validity of such offer because of the inclusion or exclusion of dignitary loss. If there is no dispute

about the validity of the offer, the recipient shall provide the offeror with written notice of acceptance or rejection within ninety days after the date on which the offer was made. This written notice must be provided by certified mail, return receipt requested, and a copy of such notice shall be filed with the court within the ninety-day response period.

In the event of a dispute as to dignitary loss, the recipient shall file a motion for the court to determine the validity of the offer. Within fifteen days after the filing of such a motion, the court shall rule as a matter of law upon such motion. If the court finds that the offer is invalid, a new offer consistent with the court's determination may be made within ten days. If the offer is found by the court to be valid, the recipient shall have an additional ten days to respond. If one of the parties disputes the validity of the offer in bad faith or for purposes of delay, that party's attorney would be liable for the costs attributable to that conduct, pursuant to section 305 of the legislation.

The Committee anticipates that disputes pursuant to this section will only arise in a small fraction of product liability cases, because in most cases it will be obvious whether the claimant has suffered dignitary loss. As defined in section 102(a)(6), dignitary loss is pain and suffering or mental anguish associated with the death of a parent, child, or spouse; serious and permanent disfigurement; loss of a limb or organ; or serious and permanent impairment of a bodily function. Usually there should be no dispute as to whether a claimant's injuries fit this description. When a question does arise, its resolution should be made by the court. Such a determination as to whether a particular injury falls within the statutory definition of dignitary loss will be a question of law with precedential value.

Section 201(e) provides that when an expedited settlement offer has been made, the court may, upon timely motion, enter an order extending the period for response up to another 90 days for discovery. Any such order shall contain a schedule for discovery of "evidence material to the issues of the circumstances of the harm and the appropriate amount of relief." Such a discovery motion shall be accompanied by a supporting affidavit of the moving party setting forth the reasons why the extension is necessary to promote the interests of justice. This affidavit must also state that the information likely to be discovered is material and is not, after reasonable inquiry, otherwise available to the moving party. It is anticipated that such discovery would be particularly useful in cases involving multiple claimants. Such discovery would be appropriate to obtain information as to such circumstances of the harm as the condition of the product at the time of injury, the manner in which the injury occurred, and the manner in which the product was being used at the time of the injury.

In considering such motions and setting forth schedules for discovery, the court should seek to assure that sufficient information is available to the recipient, whether the recipient is a claimant or a defendant, to determine whether to accept or reject the offer. At the same time, however, such discovery should be limited to the extent possible to assure an expeditious response to the offer and to avoid undue burdens on the parties. Thus, for example, in balanc-

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ing these interests, the court should consider a rough estimate of net economic loss to be sufficient for the purposes of this subsection, if it is based on information as to collateral sources of recovery for the same harm and the types of losses to be compensated in the settlement.

Section 201(f) provides that, unless otherwise agreed by the parties, a failure to respond to a settlement offer within the applicable time period shall be deemed to be a rejection of the offer, and the provisions of sections 203 and 204 as to recovery of attorney's fees and limitations on liability shall apply.

Section 201(g) provides that any dispute involving the amount of net economic loss shall be resolved by the court, unless the parties agree to be bound by determinations made pursuant to any voluntary alternative dispute resolution procedures established or recognized under the law of the State in which the civil action has been brought, or under the rules of the court in which such action is maintained. The Committee considers such alternative dispute resolution procedures to be an appropriate means of dealing with such disagreements, and anticipates that state courts will encourage the use of such procedures in order to relieve their dockets.[109] Moreover, it is intended by the Committee that the definition of net economic loss will be interpreted in such disputes to assure that the claimant has an opportunity to settle for all those reasonable and necessary expenses arising from the harm that are not reimbursed by other sources.

Section 201(h) provides that an offer of settlement shall stay a civil action until the recipient responds to the offer or the applicable period for response expires. This subsection shall not, however, prevent the court from exercising jurisdiction over disputes regarding dignitary loss pursuant to section 201(d) or discovery pursuant to section 201(e).

SECTION 202—RIGHTS UPON SETTLEMENT

In general

Section 202 specifies the rights of the parties when a title II offer of settlement has been accepted. Such an acceptance shall bar the claimant from suing any person for damages arising from the same harm. The claimant's civil action in which the settlement is reached shall be dismissed, except that the court shall retain jurisdiction for the purpose of resolving disputes concerning the amount of the claimant's net economic loss.

In the absence of a prior written agreement to the contrary, a defendant who has entered into a title II settlement may not be made a defendant in any action brought by any other party for contribution, reimbursement, subrogation, or indemnity for damages arising from the same harm. Likewise, neither the claimant's employer nor any insurer shall have any such right of recovery against the defendant or any lien on the claimant' settlement from the defendant. Moreover, although the defendant who has entered into a settlement agreement may seek reimbursement from others responsible for the claimant's harm, pursuant to section 206, the defendnt shall have no right of contribution or indemnity against the claimant's employer or fellow employee.

When a title II offer settlement is agreed to, section 202 terminates almost all litigation for damages arising from the claimant's harm and reduces transaction costs for all those involved. Disputes over the amount of the claimant's net economic loss will continue to be resolved on an expedited basis by the court or by the recognized alternttive dispute resolution mechanisms, pursuant to section 201(g). Disputes over contributions are likely to be resolved in a similar fashion, pursuant to section 206(c).

As reported

Section 202 (a) provides that a claimant may not bring or maintain a civil action against any person for damages arising from the same harm, if any defendant has accepted the claimant's offer of settlement made pursuant to section 210 and has paid or agreed in writing to make payment to the claimant pursuant to section 205. Such a civil action also is barred if any defendant's offer of settlement in accordance with section 201 has been accepted in writing by the claimant. In such circumstances, the court shall dismiss the claimant's pending civil action, in which the defendant is a party, upon motion of any party to the settlement.

The purpose of title II is to resolve product liability disputes quickly, to provide greater certainty of recovery for those injured by defective products, and to reduce litigation. This section, thus, will prevent the claimant who has been compensated by an expedited title II settlement from using the proceeds of this settlement to finance litigation against another party. However, persons who are partly responsible for the claimant's harm, but who do not participate in the settlement, will still be liable for contribution pursuant to section 206; the claimant's inability to sue them directly will not relieve them of their financial obligations.

Section 202(b) bars others from seeking recovery from the defendant for the same harm to the claimant. It provides that if a claimant is precluded from bringing or maintaining a civil action under subsection (a) of this section, a defendant who has entered into a title II settlement with the claimant may not be made a defendant in any action brought by any other party for contribution, reimbursement, subrogation or indemnity for damages arising from the same harm, in the absence of a prior written agreement to the contrary. The only exception provided is for disputes involving the defendant's reimbursement for the settlement, pursuant to section 206 of this title.

Section 202(c) declares that the workers' compensation reforms enacted in section 307 of the bill shall also apply in expedited settlements. Neither the claimant's employer nor any insurer shall have any right of subrogation, contribution, or indemnity against the defendant or any lien on the claimant's settlement from the defendant. In addition, the defendant shall have no right of contribution or indemnity against the claimant's employer or fellow employee.

SECTION 203—REJECTION OF CLAIMANT'S OFFER OF SETTLEMENT

In general

Section 203 describes the rights of claimants when a title II offer of settlement has been rejected by a defendant. If a judgment is entered against the defendant which the court determines to be equal to or greater than the current value of the claimant's expedited settlement offer, the court shall increase the judgment by the claimant's reasonable attorney's fees and costs, up to $100,000, from the date on which the defendant rejected such offer until the date of entry of judgment. For the purposes of this section, attorney's fees shall be calculated on an hourly basis. The attorney's fees and costs to be awarded in such circumstances shall be reduced by the court if the court determines that the defendant had a reasonable basis for rejecting the offer of settlement made by the claimant because the case involved novel questions of law or complex questions of fact.

The purpose of this section is to promote expedited settlement of product liability disputes by rewarding a claimant who makes a title II offer of settlement and penalizing a defendant who unreasonably rejects such an offer.

As reported

Section 203(a) provides that if a verdict is entered against the defendant which the court determines to be equal to or greater than the current value of the claimant's expedited settlement offer, the court shall include in the judgment against the defendant an amount for the claimant's reasonable attorney's fees and costs, not to exceed $100,000, incurred by the claimant from the date on which the defendant rejected such offer or failed to respond as provided in section 201 until the date of entry of the claimant's judgment. Such fees shall be offset against, but shall not exceed, any fees owed by the claimant to the claimant's attorney by reason of the verdict.

It is the responsibility of the court to make a determination of the current value of a title II offer of settlement for comparison with the court's actual damage award. In cases where more than one defendant has rejected the settlement offer, the court, in the interest of justice, may exercise its discretion as to the allocation of responsibility for these fees and costs.

During the Committee's consideration of possible incentives for settlement in product liability actions, a number of legal scholars provided advice and assistance. Among them was Professor Guido Calabresi, who argued that a provision such as section 203(a) is a particularly important incentive. As he explained:

> [O]therwise manufacturers would offer to settle only those cases that involve a major misconduct on their part, and would force litigation in most other cases. Without an incentive to settle cases where the seriousness of the misconduct is in doubt, the proposal would essentially serve only as a device to diminish the responsibility of those who are seriously at fault. With this incentive it would even-handedly induce settlements even when one of the parties

thought he had a shot at winning under existing law. It is this aspect that serves to reduce administrative costs.[110]

Section 203(b) provides that the defendant's liability for the claimant's attorney's fees shall be reduced by the court if the court determines that the defendant had a reasonable basis for rejecting the claimant's offer of settlement because the case involved a novel question of law or complex questions of fact. The degree to which such fees and costs shall be reduced is left to the discretion of the court. The Committee's intent here is to encourage reasonable settlements without inhibiting the right of defendants to litigate novel and untried questions of law, as well as complex and material factual issues, when each party has a reasonable basis for asserting its position and litigation is appropriate.

Section 203(c) provides that for purposes of this section, attorney's fees shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and the complexity of the case. The effect of this subsection in cases in which the claimant is represented on a contingent fee basis is that the claimant's attorney's fees added to the judgment will be calculated on a hourly basis and offset against the contingent fee.

SECTION 204—RIGHTS UPON CLAIMANT'S REJECTION OF OFFER OF SETTLEMENT

In general

Section 204 describes the rights of defendants whose title II offers of settlement are rejected by claimants. In such cases, if the defendant is found liable for the claimant's harm, the defendant's liability for the claimant's economic loss shall not exceed the claimant's net economic loss. In cases in which the court finds that recovery for dignitary loss would be appropriate, the claimant's recovery for non-economic loss (excluding punitive damages) shall not exceed $250,000. If recovery for dignitary loss is not appropriate, non-economic loss shall be capped at twice the claimant's economic loss or $50,000, whichever is less. If more than one defendant joins in an offer of settlement, these limitations on damages shall apply in the aggregate to such defendants.

These provisions are intended to provide greater certainty with respect to the recovery of claimants and the liability of defendants; they are designed to maximize the incentives for defendants to make fair, timely settlement offers. Defendants will be encouraged to make such offers, because if they do so, their potential liability will be limited regardless of whether the offer is accepted. As a result, many claimants will be compensated quickly and fully, without the delays and uncertainties of the present system.

Present law

This section places caps on non-economic losses—recovery for pain and suffering—in product liability cases when a title II settlement offer has been rejected by a claimant. At the state level, six caps on pain and suffering have been recently enacted that are ap-

plicable to product liability cases. These limits have been established in Washington (0.43 times the average annual wage times the plaintiff's life expectancy; 1986 Laws Ch. 305), Florida ($450,000; Ch. 86-160), Maryland ($350,000; 1986 Laws Ch. 639), New Hampshire ($875,000; 1986 Laws Ch. 227), and Colorado ($250,000, which may be increased to $500,000 only by clear and convincing evidence; Colo. Rev. Stat. 13-21-102.5). Other states are contemplating similar limitations.[111]

The limitations of section 204 are an integral part of the settlement-fostering procedures of the bill and are not intended to affect such other limitations on the amount of damages that may be imposed under state law. These state caps are not conditioned on any kind of settlement offer and are not superseded by this legislation, except in those cases where a title II offer has been rejected. The conditional and generally more restrictive limits imposed by section 204 would be available only to defendants who have made an expedited offer of settlement pursuant to title II of this bill to pay the claimant's net economic losses and, where appropriate, $100,000 for dignitary loss.

Effective incentives, like those provided in section 204, are needed because the present product liability system creates perverse incentives that discourage settlement, promote delay and generate excessive transaction costs. Professor Jeffrey O'Connell has described the problem in graphic detail:

> Despite the fact that the optimal resolution of many tort claims is prompt payment of the claimant's net economic loss, defendants rarely make such offers. On one hand, the defendant may be confident that he can defeat or at least wear down the claimant, given the difficulties and delays in proving a tort claim. The long delay before trial, for instance, often enables the defendant to bargain down even the claimant clearly entitled to tort damages because the claimant needs money to pay medical bills or to make up for wage loss. On the other hand, the defendant may fear that an offer to settle for the claimant's net economic loss will simply encourage the claimant and his lawyer to demand a larger settlement offer, given the potential for an award at trial that includes pain and sufering and duplicated collateral sources. Furthermore, the defendant normally must sweeten any settlement offer for actual losses by at least one-third to cover the claimant's legal fees; otherwise, the claimant's legal fees will come out of his own pocket. In addition, defense attorneys are paid by the hour and receive additional payment for days in court. As a result, they often settle cases only after swearing in a jury in other to collect the fee for a "day in court." For these reasons, defendants often fail to offer to settle promptly for the claimant's net economic loss even when it is most advantageous for them to do so.
>
> Even when defendants do offer to settle for claimants' net economic loss, claimants frequently reject such offers, usually at the advice of their counsel, because they hope they can settle for or recover much larger sums than their

> actual losses. Frequently, a claimant simply may not be in a position to accept an offer that objectively makes sense. The average claimant is ignorant of the arcane technicalities of tort law. Therefore, he is dependent upon a personal injury lawyer with whom he has had no prior dealings and whom he may never see again after his case. Like the defense lawyer, the claimant's lawyer is seldom anxious to settle the case early and inexpensively. As Melvin Reder, a University of Chicago economist, has pointed out, the claimant's lawyer stands in a very different position that the claimant in his willingness to resist settlement. The claimant's lawyer has much better "portfolio diversification" than the claimant. The lawyer handles many different claims, whereas the claimant rarely has more than one in a lifetime. Reder argues that the claimant's lawyer avoids the risk of being dependent on a given case even further by engaging another attorney as co-counsel or, indeed, by having created a partnership with other attorneys. Additionally, even if a defendant today makes an offer to settle for the claimant's net economic loss, the collateral source insurer usually has subrogation rights, so that any settlement agreement reached by the claimant may not bind the insurer.[112]

The impact of these perverse incentives falls hardest on those who are most severly injured. As previously noted, the tort system grossly overpays people with small losses, while underpaying those with the most serious losses, and it does so only after years of delay and uncertainty of recovery.[113] In contrast, section 204 provides a powerful incentive for defendants to make prompt offers to pay the claimant's net economic loss and, in cases of severe and permanent injuries, $100,000 for pain and suffering.

As reported

Section 204(a) provides in a civil action subject to the bill, when a defendant's title II offer of settlement is rejected by the claimant, the provisions of this section shall apply if the defendant is found liable for harm to the claimant. In other circumstances, the limitations on liability imposed by this section are inapplicable.

Section 204(b) provides that, when a defendant's title II offer of settlement has been rejected by the claimant, the liability of the defendant for the claimant's economic loss shall not exceed the claimant's net economic loss. As noted above, net economic loss covers those losses that are not reimbursed by collateral sources. Thus, if a defendant makes a timely offer of settlement pursuant to title II, the defendant cannot be held liable for those losses that are paid or payable to the claimant from other sources by reason of the same harm.

Consideration of such collateral sources in awarding damages has been barred traditionally in the tort system on the theory that a defendant who is at fault should not benefit from the victim's prudence in insuring himself against injury. The result of this collateral source rule in some cases is that the claimant is permitted to obtain double recovery. It is more difficult to justify this rule

where the standard of liability is not based on fault, as in strict product liability cases,[114] and this subsection abolishes the collateral source rule in cases where the defendant promptly offers to forego further litigation and to pay the claimant's net economic loss plus, where appropriate, $100,000 for dignitary loss.

In cases where the defendant's title II offer of settlement has been rejected by the claimant, section 204(c) establishes limitations on the defendant's liability for the claimant's non-economic loss, other than punitive damages. With respect to these limitations, section 204(c) distinguishes between less serious cases and the most severe cases of injury in which the claimant has suffered serious and permanent harm that constitutes dignitary loss, as defined in section 102(a)(6).[115] Prior to the entry for judgment, the court shall make a finding as to whether recovery for dignitary loss is appropriate. Such a finding already may have been made by the court in resolving a dispute as to the validity of the offer of settlement, pursuant to section 201(d). In such circumstances, no additional finding is required.

If the court finds that the claimant has suffered serious and permanent injury that comes within the bill's definition of dignitary loss, then the liability of the defendant for the claimant's non-economic loss shall not exceed $250,000. In the great majority of cases where the court finds that recovery for dignitary loss is not appropriate, the liability of the defendant for the claimant's dignitary loss shall not exceed two times the claimants economic loss of $50,000, whichever is less.

These caps only apply if the claimant has rejected an offer by the defendant to pay the claimant's actual economic losses that are not reimbursed by other sources plus $100,000 for pain and suffering in the most serious cases. These limitations on liability do not reflect any judgment by the Committee as to the size or incidence of such awards for pain and suffering. Indeed, the Committee recognizes that in many instances it is not possible to compensate someone fully for the pain and anguish that has been suffered and continues to be suffered because of a devastating injury or the loss of a family member. At the same time, however, the Committee does take note of the fact that non-economic awards for pain and suffering are inherently subjective and unpredictable. The Committee notes, too, that non-economic damages can obstruct the settlement process, because the open-ended nature of such awards encourage claimants to press even marginal claims. Moreover, as shown above, the tort system grossly overpays those with the smallest losses, while undercompensating those with the most serious losses. Some are able to recover their economic losses and to receive some payment for their pain and suffering, but many of these injured by defective products recover nothing. They also face years of delay and the costs of protracted litigation

Those injured by defective products seek full, swift, and more certain recovery. Manufacturers and product sellers seek greater predictability with respect to the scope of their liability, particularly with respect to such subjective matters as pain and suffering. The caps imposed by section 204(c) address these concerns. First, they reduce the unpredictability of the product liability litigation system for both claimants and defendants. Second, they are a com-

pelling incentive for defendants to offer to pay the claimant's actual losses as they are incurred, plus an additional $100,000 for pain and suffering in the most serious cases, and to do so in the initial stages of litigation—not five years later when the average-sized product liability claim is paid.[116]

There are those who insist that there should be no restriction on the right of a person injured by a product to seek unlimited recovery in the product liability litigation system. Section 204(c) limits the right to such recovery but only in exchange for greater certainty of full compensation for actual losses on an expedited basis. Some have suggested, too, that it would be fairer to the most severely injured victims if the $250,000 cap were deleted, leaving only the $50,000 cap for the lower levels of injury. However, without the $250,000 cap there would not be sufficient incentive for a defendant to make a title II offer of settlement, and as noted above, it is the most seriously injured who are undercompensated the most and face the greatest delay in recovery. Without such an effective incentive for settlement, the inequities of the present system would be perpetuated. Many of those suffering serious injuries would have no greater certainty of recovery and still would be forced to settle for less than their full loss to meet pressing financial needs.

In sum, the limitations of section 204(c) will encourage faster, more equitable settlement of product liability claims.

Section 204(d) provides that in any such civil action tried by a jury, the jury shall be instructed to make specific findings of fact regarding the portion of any damage award allocable to economic loss and the portion allocable to non-economic loss. The jury shall not be instructed regarding the section 204 limitations on economic and non-economic damages, but the award shall be reduced by the court in accordance with these limitations. The jury is not instructed as to the section 204 limitations on liability, because of concern that such information could inflate the jury's damage awards.

Section 204(e) provides that if more than one defendant joins in an offer of settlement, these limitations on damages shall apply in the aggregate to such defendants. This will encourage defendants to join in such offers.

SECTION 205—PAYMENT OF NET ECONOMIC LOSS

In general

Section 205 describes the manner in which net economic loss shall be paid by a defendant in a title II settlement agreement. Such loss shall be paid periodically as costs are incurred, unless the parties to the settlement agree otherwise. An obligation to make payment of net economic loss may be discharged initially or at any time thereafter by a settlement agreement, including an agreement to make a lump-sum payment. Any agreement to discharge an obligation for net economic loss of $10,000 or more must be found by the court to be fair to the claimant. Unless the parties agree to the contrary, a title II settlement agreement may be modified upon a finding that a material and substantial change of circumstances has occurred after the date on which the agreement was made or that there is newly discovered evidence concerning the claimant's physical condition, loss, or rehabilitation, which could not have

been known prior to the date of such agreement. When payment of net economic loss is made periodically as it is incurred and a period of five years has elapsed since the claimant's most recent claim for payment, the claimant shall not be entitled to receive any additional payment.

Present law

This section provides for periodic payment of net economic loss as costs are incurred, unless the parties to the settlement agree to another method of payment; it also provides for modification and review of such a periodic payment scheme. Fifteen states presently provide for the periodic payment of certain personal injury judgments. In general, however, these states do not permit the amount of the claimant's damages to be reevaluated after entry of judgment.[117]

Most states today follow the old common-law rule that future damages are paid in a lump sum, and cannot be reviewed at a later date if the plaintiff's injuries prove to be different than expected.[118] This rule has been criticized as forcing the plaintiff to bear a risk that ought to be borne by the person who caused the plaintiff's injury. Thus, one treatise concludes that "the single recovery rule is often both capricious and inflexible in its operation so that damages in accident cases, even where they are awarded and actually paid, often fail to do the job they should if accident law is to perform its function of administering accident losses efficiently in the public interest."[119]

In contrast, workers' compensation and no-fault auto insurance pay the victim's losses as they accrue. The result is that plaintiffs are not forced to bear the risk of judicial error. In these areas, insurance companies have not had undue difficulty in coping with such open-ended liability; the uncertainty posed by individual claimants who may or may not develop medical complications becomes less great when spread among a large number of claimants.[120] The distribution of individuals' risks among large numbers of persons is, of course, fundamental to the principles of insurance.[121]

Some have suggested that variable awards will add to court congestion. That has not been the result, however, in the many European countries that permit such awards.

> Experience in Germany and elsewhere does not bear out this fear. In the first place, in obedience to the law of economy, norms tend to develop as to what change of circumstances is sufficiently substantial to warrant variation. This in turn provides the basis for making so routine the process of adjustment that recourse to the courts for variation stands in much the same negligible proportion as that of litigated claims generally to those that are settled by compromise. In sum, in almost all cases the matter is disposed of extra-judicially by agreement between the claimant and the tortfeasor's insurance company.[122]

The Justice Department's recently released Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Afford-

ability (February, 1986) pp. 69–70, listed three advantages of periodic payments. First, they make judgments more affordable to defendants. Second, they prevent plaintiffs from depleting their awards quickly, reducing the likelihood that they will become wards of the state. Third, courts computing the amount of a lump-sum award take into account the interest it will earn, but the interest rate they use may bear little relationship to what is in fact available in the market. A periodic payment system can avoid this problem by requiring the defendant to purchase an annuity, the price of which is determined by the market. "Since the payments are guaranteed through the annuity, subsequent changes in the interest rate would have no effect on the plaintiff's compensation."

As reported

Section 205(a) provides that, in a title II settlement, net economic loss shall be paid periodically as costs are incurred, but not later than thirty days after the date on which reasonable proof of the fact and amount of net economic loss incurred is submitted to any defendant who is a party to a settlement. It is anticipated that the court in which the claimant's action has been brought will impose appropriate sanctions for failure to make such payment.

Section 205(b) provides that this obligation to pay net economic loss periodically as costs are incurred may be discharged initially or at any time thereafter by a settlement agreement, including an agreement to make a lump-sum payment. This section adds, however, that no such discharge shall be made with respect to harm giving rise to an estimated value of net economic loss equal to or greater than $10,000 unless the court determines that the settlement is fair to the claimant. This requirement of review by the court in which the claimant's action has been brought is intended to assure that the alternative agreed to by the parties to the settlement is in the interest of the claimant.[123]

Section 205(b) also provides that a settlement agreement may be modified upon a finding by the court that a material and substantial change of circumstances has occurred after the date on which the agreement was made or that there is newly discovered evidence concerning the claimant's physical condition, loss, or rehabilitation, which could not have been known prior to the date of such agreement. In addition, section 205(b) states that the court, upon application of any party to the settlement, may make appropriate orders concerning the protection and disbursement of the proceeds of a settlement agreement entered into under this section.

This court oversight of settlement agreement and the opportunity for modification of such agreements is intended to protect the interests of all parties to such settlements when there has been a change in circumstances involving the claimant or any party to the settlement. It is not intended, however, to affect the finality of any lump-sum settlement agreements in which the parties have agreed that all obligations have been discharged and that there shall be no further court review. In such instances, if the agreement discharges an obligation to pay net economic loss of $10,000 or more, the court must review the agreement to assure that it is fair to the claimant. But if the agreement is found to be fair, this ends court

review and the settlement agreement is not subject to further modification by the court.

Section 205(c) povides that if a period of five years has elapsed after the most recent claim for payment is made with respect to the harm at issue, the claimant shall not be entitled to receive payment for any additional net economic loss with respect to such harm. This provision imposes a limit on the obligation to pay net economic loss as it is incurred. It resembles similar limitations in some state no-fault laws, which provide for periodic payments of incurred losses and bar additional recovery after three or four years. These laws, like the statutes of limitations and of repose in section 304, are intended to provide finality with respect to product liability disputes.[124]

SECTION 206—REIMBURSEMENT

Section 206 governs the reimbursement of parties to a title II settlement who seek recovery from others responsible for the claimant's harm. A defendant who enters into a title II settlement shall be subrogated to any rights of the claimant against another person with respect to the harm at issue to the extent that the amount to be paid in the settlement exceeds the defendant's comparative responsibility for the claimant's loss. Any other person provided with notice by a defendant that an offer of settlement has been made shall determine whether to contribute its proportionate share of the settlement offer and may join in the settlement on this basis. If such a person refuses to participate in the expedited settlement, the defendant who has entered into a title II settlement agreement may recover one and one-half times the amount of the subrogation recovery, plus reasonable attorney's fees and costs incurred in seeking such subrogation recovery.

As reported

Section 206(a) provides that a defendant who has entered into a title II settlement shall be subrogated to any rights of the claimant against another person arising from or contributing to the harm at issue to the extent that the amount of loss paid or to be paid in the settlement exceeds such defendant's comparative proportion of responsibility for such loss. This provision ensures that defendants who agree to a title II settlement will have an opportunity to limit their share of the claimant's compensation on the basis of their comparative fault.

Section 206(b) provides that any other person given notice by a defendant of an offer of settlement shall, within 90 days, determine whether to contribute its proportionate share of the settlement offer, based upon its comparative responsibility. This provision provides an opportunity for those persons who are not parties to the claimant's civil action to participate in the title II settlement process. Any potentially liable person who would benefit may join in the defendant's response to the claimant's offer of settlement or in an offer of settlement made by a defendant. Any person or party who joins in such a settlement is deemed to have agreed to pay a share of the claimant's net economic loss and any dignitary loss,

based on the comparative responsibility of all those joined in the settlement other than the claimant.

Section 206(c) provides that persons who join in such a settlement shall be bound by the court's determination, made upon motion by any such person, of their proportionate shares of responsibility for the claimant's loss, unless such persons agree to be bound by any voluntary alternative dispute resolution procedures established or recognized under the law of the State in which the civil action for harm caused by a product has been brought, or under the rules of the court in which such action is maintained. The Committee regards such alternative dispute resolution procedures as an appropriate means for allocating responsibility among all those who join in compensating the claimant pursuant to a title II settlement agreement. It is anticipated that state courts will encourage the use of such procedures in order to reduce their caseloads.

Section 206(d) provides that if any person who is responsible for causing the claimant's harm and who has received notice of the settlement offer pursuant to section 206(b) refuses to participate in the title II settlement, a defendant who has entered into a title II settlement agreement may recover from such person a total amount equal to the amount of the appropriate subrogation recovery plus one-half of the amount of such subrogation recovery, in addition to reasonable attorney's fees and costs incurred in seeking such subrogation recovery. This provision will discourage those who are responsible for causing the claimant's harm from seeking to place the entire burden of such harm on the party who chose to settle. It will, thus, encourage settlements while reducing the transaction costs associated with suits for contribution.

Section 206(d) adds that if an action is brought under this section against another person (other than the claimant's employer or fellow employee) for contribution, reimbursement or indemnity, and the action is not a civil action subject to this legislation, such action shall be governed by applicable standards of liability under state or Federal law. This language is consistent with sections 103 and 202 of the bill.

Section 206(e) provides that, for purposes of determining a defendant's subrogation recovery, attorney's fees shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and the complexity of the case.

TITLE III

This title of the bill sets forth uniform standards that govern product liability actions litigated in the courts.

SECTION 301—CIVIL ACTIONS

As reported

Section 301 provides that a person seeking to recover for harm caused by a product may bring a civil action against the product's manufacturer or the product seller pursuant to applicable state or

Federal law, except to the extent that such law is superseded by this bill. For the purposes of title III, this means that such civil actions will be governed by existing liability standards and rules, except to the extent that they are superseded by uniform standards and rules established by this bill.

SECTION 302—UNIFORM STANDARDS OF PRODUCT SELLER LIABILITY

In general

Section 302 specifies when a product seller other than a manufacturer [125] is responsible for harm caused by a product. A product seller is liable for harm caused (1) by its own failure to exercise reasonable care with respect to the product, or (2) by a product that fails to conform to an express warranty made by the product seller. In addition, the product seller may be liable as if it were the manufacturer if the manufacturer responsible is not subject to service of process or if the court determines that the claimant would not be able to enforce a judgment against the manufacturer.

Present law

In a number of States, product sellers are liable for harms caused by a product as if they were manufacturers of the product. Thus, product sellers may be held responsible for product-related harms that they did not cause and over which they had no control.

Two reasons have been advanced for holding product sellers liable as if they were manufacturers. First, it has been argued that the rule promotes safety and reduces the risk of harm, because product sellers will seek to avoid liability by pressuring manufacturers to make safe products.[126] This rationale, however, fails to recognize that manufacturers will feel the same, if not greater, pressure to make safe products if they are sued directly for harms caused by their own product defects.

Second, it has been argued that the rule is fair because a product seller who is held liable for harm caused by a manufacturer's defect can seek indemnity [127] and thereby shift the cost of liability to the manufacturer who actually caused the harm.[128] Data show that, in fact, product sellers account for less than five percent of product liability payments [129] because generally they are successful in shifting the cost of liability to the manufacturers.

Although the end result may be fair, the system is inefficient. Product sellers are routinely sued for harms caused by a manufacturer and are forced to incur substantial legal costs both to defend the product liability lawsuit and to seek indemnification from the responsible manufacturer.[130] As courts have recognized, the product seller is not truly "held harmless" through indemnification if the product seller must "expend large sums to defend a products liability action merely because a defective product, the defect of which may be attributable solely to the manufacturer's conduct, passed through [his] hands." [131] Further, indemnity does not reimburse product sellers for loss of good will or reputation caused by lawsuits.

Some cases [132] and a number of State statutes [133] have recognized the inequity of the majority rule. Section 302(a)(1) is based on the case law and State statutes which provide that product sellers

are responsible only for the harms caused by their *own* wrongful conduct in handling the product. This rule recognizes that, because manufacturers ultimately pay for harms caused by their own products, claims should be brought directly against them rather than against product sellers. In the event, however, that the manufacturer responsible for the harm is not subject to service of process by the injured claimant or would be unable to pay the judgment, the product seller should be treated as if the product seller were the manufacturer. Under the circumstances, the claimant would have no recourse unless the product seller is held responsible as the manufacturer.[134]

This approach eliminates unnecessary and burdensome legal costs and provides incentives for product safety without affecting a claimant's ability to recover for harms caused by a product defect.

As reported

Section 302(a) identifies two situations in which a product seller other than a manufacturer is liable for harm caused by a product. Both follow the rule that a product seller is responsible for the consequences of the product seller's own conduct. This concept of individual responsibility, of placing responsibility on the party that actually caused and could have prevented the harm, encourages product safety on the part of product sellers.

First, a claimant will recover from a product seller if: the individual product unit that caused the harm was sold or otherwise placed in the stream of commerce by the product seller; the product seller failed to exercise reasonable care with respect to the product; and the failure to exercise reasonable care was a proximate cause of the claimant's harm. Second, a claimant will recover from a product seller if the product seller made an express warranty about the product, independent of any express warranty made by the manufacturer; the product failed to conform to the warranty; and the failure to conform to the warranty caused the claimant's harm.

Section 302(b) sets forth factors that may be relevant in determining whether the product seller failed to exercise reasonable prudence with respect to the product. The trier of fact may consider, among other factors, the effect of the seller's conduct with respect to the construction, inspection, or condition of the product and any failure of the product seller to pass on adequate warnings or instructions about the dangers and proper use of the product. The product seller is not liable for failure to warn if it provided to the person who took possession and control of the product any written warnings or instructions it had received up to that time, and made reasonable efforts to provide users with those warnings and instructions it received after the product left its possession and control. Nor shall the seller be liable, except for breach of express warranty, if there was no reasonable opportunity to inspect the product in a manner that would have or, in the exercise of reasonable care, should have revealed the product's danger. For example, a seller may not have had a reasonable opportunity to discover a product defect if the product was prepackaged [135] or if the product never passed through the seller's hands (e.g., a person may have held title to a product but may never have had possession of it).[136]

Section 302(c) provides that a product seller shall be treated as the product manufacturer and shall be liable for the claimant's harm as if the product seller were the manufacturer if (1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought by the claimant; or (2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer. For example, a judgment would be unenforceable if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay. A claimant may recover from the product seller for harms that were caused by the manufacturer if one of these two provisions applies, and if the claimant proves that the manufacturer would have been liable under State law. Although section 302(c) departs from the notion of individual responsibility for harms, it ensures that a claimant can recover from the product seller if he or she is unable to recover from the manufacturer responsible for the harms.

Section 302 will encourage safety by placing responsibility on the party who caused and could have prevented the harm. It will reduce the unnecessary costs and inefficiencies associated with the current system. Sellers will no longer be exposed routinely to liability for harms caused by manufacturers. The legal costs of defending product liability claims and seeking indemnification will be substantially reduced. At the same time, section 302 ensures that claimants harmed by defective products may recover from product sellers if the responsible manufacturer is unavailable or judgment-proof.

SECTION 303—UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

In general

Section 303 establishes a uniform standard of liability for punitive damages. Such damages may be awarded only if the claimant establishes by clear and convincing evidence that the harm suffered was the result of the manufacturer's or product seller's conscious, flagrant indifference to the safety of those who might be harmed by a product. Punitive damages may not be imposed upon manufacturers or sellers of prescription and over-the-counter drugs, and medical devices, as well as the manufacturers of aircraft, for harm caused by those products, when the safety of those products has been approved by the appropriate federal agency prior to the marketing of the product, unless the manufacturer committed fraud during the reviewing process by withholding or misrepresenting relevant information.

Present law

The purpose of punitive damages is to punish a defendant for outrageous conduct and deter such conduct in the future by the defendant and by others.[137] Such damages are a quasi-criminal sanction and, thus, go beyond compensating the claimant for the claimant's injuries. Punitive damages may be awarded to a claimant in civil actions in most States.[138]

The trier of fact has total discretion over whether punitive damages should be assessed against a defendant. State standards or guidelines for determining whether a defendant should pay puni-

tive damages are not uniform; these standards involve some degree of conscious misconduct and refer variously to "willful," "wanton," "malicious," or "reckless" disregard for the rights of others.[139]

In most jurisdictions today, the claimant must prove by a preponderance of the evidence that the defendant acted in a manner that warrants punitive damages.[140] To reflect the quasi-criminal nature of such punishment, section 303 of the bill follows the rule that is emerging in States: the burden of proof is raised to clear and convincing evidence, a standard of proof closer to the criminal law standard for imposing punishment.

While commentators disagree as to the full extent of this growth, it is clear that punitive damage awards have been increasing both in size and in number in the past ten years. Until 1977, there had been only a small number of punitive damage awards in products liability cases. Since then, the frequency of these awards has increased. Punitive damages are routinely sought and, when awarded, tend to be very large.[141]

Counts for punitive damages are routinely included in complaints in product liability actions. If nothing else, such counts provide an opportunity for presenting evidence to the jury as to the resources of the defendant; moreover, such claims discourage settlement, because of the absence of clear guidelines as to liability. As one legal scholar has noted:

> When the prospect of punitive damages enters the picture, these guidelines disappear. It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon. Furthermore, a defendant who believes that the situation does not call for punitive damages cannot factor their potential into settlement discussions. To do so is to set a pattern for all future settlements in countless cases already in litigation or yet to be brought. In short, unless the situation truly calls for punitive damages, they sabotage settlement negotiations by thrusting a huge "unknown" into the negotiations.[142]

At present, compliance with government standards is not a defense against punitive damages.[143] Instead, courts generally are not bound by safety determinations made by regulatory agencies. The results have raised questions about judicial nondeference to agency determinations with respect to industries that are comprehensively regulated.[144] Such was the case, for example, when a Kansas jury decided to assess $8 million in punitive damages against the manufacturer of the Sabin polio vaccine.[145] One scholar concluded that the jury "was invited to, and did, impose punitive damages for the purpose of forcing the United States to change its polio vaccination policy."[146]

As reported

Section 303(a) specifies when punitive damages may be assessed against a manufacturer or product seller in a product liability action. If otherwise permitted by applicable law, punitive damages may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant

indifference to the safety of those persons who might be harmed by a product.

The standard of liability for punitive damages in this section requires a "conscious, flagrant indifference" to consumer safety. This is a high standard of culpability, requiring a showing of fault far in excess of mere negligence, or even gross negligence. The specifications that the misconduct be "conscious" and "flagrant" are designed to assure that punitive damages will not be assessed unless the defendant's conduct was truly reprehensible—knowingly far in excess of acceptable behavior. The misconduct must be an extreme deviation from the ordinary conduct of manufacturers and product sellers.[147]

It is important to establish the punitive damages threshold far from ordinary negligence in order to assure that manufacturers are not subjected to punitive damages assessments, on top of compensatory damages, for making good faith errors.[148] As one legal scholar has explained:

> [E]ven if the product is finally found "defective," the case for punitive damages almost always will be quite weak if a plausible case for nondefectiveness was made the other way. Such damages usually will not be appropriate unless the product was very defective, and plainly so, at the time it was sold. A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.[149]

Finally, to be "conscious" of its flagrant misconduct, a manufacturer or product seller must be aware that its product is legally defective and that its conduct in selling it in such a condition is therefore improper. Mere consciousness that its product is dangerous, that it can or indeed probably will cause substantial harm or even death, is thus insufficient by itself, since manufacturers of many dangerous products—such as cars, power saws, and chemicals—surely are fully conscious of the inherent dangers in their products.[150] It is only when a manufacturer consciously leaves in its product a danger that is unreasonable, and sells the product to the public knowing it to be defective, that its conduct can be said to manifest a "conscious, flagrant indifference" to consumer safety.[151]

Section 303(a) adds that a failure to exercise reasonable care in choosing among alternative designs, formulations, instructions, or warnings is not, in itself, conduct for which the award of punitive damages would be appropriate. This sentence is intended to clarify further the punitive damage standard of liability by drawing a clear distinction between mere negligence and the aggravated misconduct which justifies the imposition of punitive damages. The mere failure to exercise reasonable care as to such a choice does not, in itself, warrant the imposition of punitive damages. In some circumstances, however, failure to exercise reasonable care as to a whole series of choices might constitute aggravated misconduct for which punitive damages are appropriate.

The "clear and convincing evidence" standard of section 303(a) requires more proof than the "preponderance of the evidence"

standard of proof traditionally used in civil actions; however, it requires less proof than the "beyond a reasonable doubt" standard that is required for use in criminal actions.[152] Thus, it is a standard of proof between the civil and criminal standards. This standard is appropriate for determining what is, in effect, a quasi-criminal sanction in a civil case.[153] It was proposed in the Uniform Product Liability Act and has recently been adopted by some States as the sound and fair rule.[154]

The rationale for the higher standard of proof rests on fairness. As one commentator explained:

> [A]n unjustified punitive damages award causes more harm to the defendant than erroneous failure to award punitive damages to the plaintiff. To reflect this imbalance, the burden of proof should favor the defendant more than does the "a preponderance of evidence test." [155]

A higher standard of proof is necessary to ensure that punitive damages are assessed only where appropriate.

Section 303(a) adds, as well, that punitive damages may not be awarded in the absence of a compensatory award, except as provided in subsection (b), which addresses an issue that is unique to the wrongful death law of a few States. Section 303(b) relates to wrongful death product liability actions where applicable State law provides, or has been construed to provide, that only punitive damages are recoverable.[156] In these unique situations, punitive damages are a substitute for compensatory awards. In such situations, a defendant is liable for punitive damages regardless of whether a claim is asserted under section 303. Further, recovery of damages in such an action shall not bar a claim under this section.[157]

Section 303(c) bars an award of punitive damages against manufacturers and sellers of prescription and over-the-counter drugs (including vaccines and other biologicals), and medical devices, as well as against manufacturers of aircraft including aircraft components, for harms caused by those products, when the safety of those products has been reviewed and recognized by the appropriate federal agency. This defense is not, however, available to any defendant who has committed fraud during the approval or review process by withholding or misrepresenting material and relevant information, with respect to the approval or review of the product in question, from any agency involved in the approval or review process.

Section 303(c) is intended to deal with the question of imposition of punitive damages in those actions involving drugs, medical devices, and aircraft. It is not intended to preempt State laws that may establish any other defense against liability in product liability actions based on compliance with government standards or the requirements of statutes or regulations concerning product design, labeling, or warnings.

This defense applies to drugs as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)) or medical devices as defined under section 201(h) of the same act. Punitive damages shall not be awarded when these products are approved by the Federal Food and Drug Administration (FDA) and are subject to pre-market approval by the agency with respect to the safety of the formulation or performance of the aspect of such drug

or device which caused the claimant's harm, or the adequacy of the packaging or labeling of such drug or device.[158] In addition, this provision applies to drugs that are generally recognized as "safe and effective" pursuant to conditions established by the FDA and applicable regulations, including packaging and labeling regulations.

Likewise, this defense applies to aircraft which are subject to pre-market certification by the Federal Aviation Administration (FAA) with respect to the safety of the design or performance of the aspect of such aircraft which caused the claimant's harm or the adequacy of the warnings regarding the operation or maintenance of such aircraft. Punitive damages shall not be awarded against the manufacturer of such an aircraft or aircraft components certified by FAA under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.).

The Committee notes that for such products as drugs and aircraft, the federal government has implemented comprehensive regulatory structures which require that a governmental agency affirmatively find the product to be safe for its intended purpose. The government has delegated to an agency with specific expertise the ability and obligation to establish reasonable and effective safety standards. The government has established and funded these regulatory systems because a governmental assessment of the risks and benefits of certain products is necessary. Where the government has carefully balanced a product's benefits and risks and has attempted to minimized those risks, manufacturers should not be punished by individual juries or threatened with punitive damages on a case-by-case basis.

The Committee has included in section 303(c) a provision removing this defense where a defendant has withheld or misrepresented material and relevant information concerning the product's performance, operation, or maintenance. The rationale behind the defense is based on the Federal government's access to and knowledge of product information. Thus, section 303(c) of the bill shields a defendant from punitive awards only if it has disclosed to the appropriate federal regulatory agency all required information during and after the licensing process. Where a defendant withholds information or misleads a federal agency or official, the defense shall not apply.

The Committee's intention is to provide a broad, general shield following a manufacturer's full, good faith compliance with the government's regulatory process. The Committee does not intent that trivial or technical errors or omissions in information furnished to regulators should suspend the shield that section 303 creates. On the other hand, substantial and material omissions of information or misrepresentations relevant to the safety and performance of such products should have precisely that effect.

The Committee recognizes that regulatory bodies are not perfect and will not always reach a level of perfection in balancing the risks and benefits of a particular product. Congress must continue to discharge its oversight duties and monitor closely the safety standards established by FDA and FAA. However, the Committee also notes the potential for enhanced safety because of this defense to punitive damages. A manufacturer's good faith effort quickly

and completely to inform the government of potential safety risks is rewarded with a defense against punitive damages. This incentive to disclose information should promote safety.

The Committee has singled out drugs and aircraft in this provision because of the unusually comprehensive regulation to which those products are subject. Since 1938, all new drugs have been subject to government pre-market approval for safety under the new drug provisions (section 505) of the Federal Food, Drug, and Cosmetic Act. Antibiotic and biological drugs (including vaccines) are also subject to pre-market approval for safety and the additional requirement of batch certification under section 507 of the Federal Food, Drug, and Cosmetic Act and section 351 of the Public Health Service Act. In addition, new animal drugs are subject to pre-market approval under section 512 of the Federal Food, Drug, and Cosmetic Act.[159]

Since 1976, innovative new medical devices have also been subject to pre-market approval for safety under the Federal Food, Drug, and Cosmetic Act.[160]

Testimony before the Committee indicates that the average cost of the FDA testing and approval process for a new drug is approximately $94 million, and the average time required for approval is ten years.[161]

The entire process is governed by detailed regulations under which pharmaceutical manufacturers have broad and continuing obligations to submit to FDA the results of their research and analysis. FDA's examination and approval covers ingredients, formulas, packaging, testing procedures, manufacturing procedures, as well as word-by-word approval of labeling, including warning information. FDA, moreover, decides what may *not* be warned against, in order to prevent over-inclusive warnings and thus to maximize the usefulness of the warnings that are given. With only limited exceptions, changes in label information or product composition also require FDA approval. FDA must be notified of all important information coming to light subsequent to initial approval, including incidents of new adverse reactions, again, subject to detailed regulations.

While some over-the-counter (OTC) drugs are subject to the new drug provisions discussed above, the great majority have been in use for many years with no safety problems whatsoever. These OTC drugs undergo a rigorous scientific review by the FDA pursuant to conditions established under the Over-the-Counter Drug Review (21 C.F.R. Part 330) whereby such drugs are examined to confirm that they are generally recognized by experts as "safe and effective." The Over-the-Counter-Review involves a comprehensive scientific examination of virtually every aspect of such OTC drugs, including their ingredients, warnings and instructions, appropriate dosage levels, and compliance with good manufacturing practices. The FDA further ensures safe and effective use of OTC drugs through regulations governing additional aspects of such products, including packaging and labeling. OTC manufacturers whose drugs are so reviewed and recognized as safe and effective after lengthy regulatory review, and whose drug packaging and labeling complies with applicable regulations, should not be held liable for punitive damages.

A similarly comprehensive regulatory structure has been imposed on the aviation industry. Since the early history of flight, the federal government has had an interest in promoting safe and efficient air commerce, civil aviation, and aeronautical research and development. Pursuant to the Federal Aviation Act of 1958, aircraft are regulated from design and production to maintenance and operation, for as long as the aircraft is able to fly in the federally controlled and federally operated air traffic system. All persons involved in the aircraft's maintenance system (mechanics and repairmen) and operation (pilots and controllers) are either federally licensed or are federal employees. The federal government investigates accidents involving aircraft and makes findings of probable cause. The federal government investigates and prosecutes infractions of its rules by individuals and corporations and, within the administrative law process, has the first level of appeal from judgments.

FAA has established Federal Aviation Regulations which require each aircraft type to receive FAA certification. In addition, each aircraft within a type must receive an airworthiness certificate, signifying its compliance with FAA design and performance standards. Federal Aviation Regulations specify detailed requirements with regard to airplane load factors during flight, design airspeeds, minimum maneuvering load factors, and operating limits for the aircraft, among other things. FAA regulations also require aircraft manufacturers to receive a production certificate before production of airplanes for sale to the public may take place. The manufacturer must be able to demonstrate an effective quality control system during production.

The Committee recognizes that aircraft may be offered for sale and sold prior to their actual manufacture. For the purposes of this section, "pre-market certification" includes all FAA certification procedures which precede the actual delivery of the aircraft to the buyer.

In sum, section 303(c) represents a congressional determination that drugs and aircraft are so extensively regulated for society's benefit that punitive damages are not appropriate. Where the government has conducted a thorough review of a product's safety aspects and risks and has dedicated a great deal of resources to assessing the benefits and risks of that product for society, the tort system should defer to that regulatory judgment.

SECTION 304—UNIFORM TIME LIMITATIONS ON LIABILITY

In general

Section 304 establishes uniform standards of limitation and repose. All civil actions governed by the bill are subject to a uniform statute of limitations that runs for two years from the discovery of the harm and its cause. In addition, such actions are subject to a 25-year statute of repose, which establishes the time period during which a manufacturer or product seller may be held responsible for harm allegedly caused by capital goods, except in cases involving toxic harm.

In product liability cases that do not involve capital goods, the manufacturer or product seller shall not be subject to liability, if it

is established that the harm was caused after the product's "useful safe life." This section establishes a rebuttable presumption that the harm was caused after the useful safe life of the product if the harm was caused more than 10 years after the time of delivery of the product. A manufacturer or product seller may be subject to liability for harm caused by a product after its useful safe life if the manufacturer has warranted that the product could be utilized safely for a longer period of time, if the manufacturer intentionally misrepresents facts or conceals information about the product, and that conduct is a proximate cause of the claimant's harm, or if the harm was caused by exposure to a product, which occurred during the product's useful safe life, even though the harm did not manifest itself until later.

The 2-year statute of limitations for product liability actions begins to run when the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. This provision will ensure that a claim is not barred before the claimant knows or has reason to know about the claimant's harm. A uniform statute of limitations for product liability actions will benefit injured persons whose rights to sue will no longer depend on which State statute happens to apply to their claim.

This section's 25-year time limitation on liability for harm allegedly caused by capital goods, referred to as a statute of repose, bars actions seeking recovery for harm caused by such products. This time limitation on liability establishes the period during which a manufacturer or product seller may be held responsible for harm caused by the product. The rational for this time limitation is that manufacturers and product sellers of capital goods, which usually have a long life, should not be exposed to liability for harms caused by these products for an unlimited period of time. A time limit on liability recognizes that claims brought long after the product was initially delivered place an unwarranted burden on trade, represent an inefficient use of judicial resources and are unfair to manufacturers, product sellers, and consumers alike.

Non-capital goods are generally used for a shorter period of time than capital goods. With respect to such products, the Committee has adopted a shorter time limitation that is not an absolute cut-off of liability. A manufacturer or product seller shall not be liable if the harm was caused after the product's useful safe life. It is presumed that there shall be no liability for harm caused by a product which occurs more than ten years after the time of delivery. By establishing only a presumption, this provision allows a plaintiff to recover where the plaintiff can show that the product that caused his or her injury has a longer useful safe life.

Present law

All States have statutes of limitations that have been applied to product liability actions.[162] A statute of limitations specifies the time within which the claimant must file his or her action. Failure to file within the specified time bars the claim. The purpose of a statute of limitations is to encourage the prompt filing and resolution of claims.[163] Both the parties and the courts benefit from the prompt filing of claims, which guards against the lose of evidence or the use of "stale" evidence.

In a number of States, the statute of limitations period begins to run at the "time of injury".[164] When an injury caused by a product is immediate and traumatic, this date is easy to determine. The claimant generally knows of his or her harm and the cause of the harm at the time of the injury. However, where the harm has a latency period or becomes manifest only after repeated exposure to the product, the claimant may not know immediately of the harm or its cause. In these situations, a "time of injury" statute of limitations may expire and bar a claim before the claimant even knows he or she has been harmed

In response to this problem, some courts and State legislatures have adopted a rule under which the limitations period begins to run when the claimant discovers the harm.[165] Even this rule may be unfair, however, because the claimant may not discover the actual cause of his or her harm until some time after he or she discovers the harm itself. The statute of limitations may expire before the claimant can reasonably discover both his or her harm and its cause.[166]

A growing number of courts and State legislatures have addressed this problem by adopting a statute of limitations that does not expire until the claimant discovers both the claimant's harm and the cause of the harm.[167] The Committee believes that this rule is the better reasoned approach and that it strikes a fair balance between the interests of the parties.

As noted, section 304 also establishes a uniform statute of repose for product liability actions. A number of states have adopted such statutes of repose in response to the problems created by open-ended liability for old products—the so-called "long tail" of liability.[168]

This open-ended liability exposure creates many problems for manufacturers and product sellers:

> First, it may be difficult to "cost in" tort liability over a period of ten, twenty, thirty, or more years, given the uncertainties of future economic developments with their effects on damages, to say nothing of the uncertainties of the legal standards that will be applied. Second, the manufacturers most consistently exposed to these risks are those producing capital goods, such as industrial machinery. These manufacturers sell relatively few products, and, therefore, may be less able to "pass through" the costs in the price of new machines. Third, if they do attempt to pass the costs through to customers, older producers, with liability exposure from units already in place, would be at a substantial competitive disadvantage compared to new entrants into the market. Fourth, regardless of what the law may be, there are substantial risks in trying cases involving older products. For example, there is a greater chance that the product has been subjected to a modification or misuse that the jury will say the manufacturer should have foreseen; there is also an increased risk that the jury, no matter how instructed will use a hindsight perspective rather than evaluate the product by the state of the art at the time it was produced. Finally, even if a

> manufacturer of an older product is able to prevail on the merits at trial, the investigation and processing of claims is an expensive procedure, and the expense is greater when witnesses and records are difficult to obtain or have long since disappeared.[169]

This "long tail" of liability is a particular problem for capital goods, because such goods are used for a much longer time than most other products and, thus, manufacturers and product sellers may be sued 30 or 40 years after a capital good has been on the market. The Insurance Services Office has determined that over half of the injuries caused by capital goods occur within two years of the date the product was made, that 72 percent occur within six years, and that 86 percent occur within 12 years.[170] Injuries that occur at a later point in time are usually due to ordinary wear and tear or poor maintenance. Even though these claims are rarely successful, manufacturers and product sellers are forced to incur the costs of defending these suits.[171]

Almost half the states have enacted statutes of repose in some form. Some states have adopted conclusive statutes, which establish an absolute bar to product liability actions for harms caused after a specified period. These time periods range from 8 to 12 years and are applicable to harms caused by all products.[172] Some states have enacted presumptive statutes of repose.[173] The presumptive statutes in some states are based on the useful safe life of the product, and have specified exceptions to the presumption similar to the exceptions in this section for misrepresentations, express warranties, and prolonged exposure to the product.[174]

Section 304 adopts a 25-year time limitation on liability applicable only to capital goods. Other products are protected by a rebuttable presumption that their useful safe life expires after 10 years. These time periods, together with the opportunity to rebut the presumption, will ensure that claimants are not unfairly barred from suing for harms. The certainty provided by these time limitations will lead to savings in transactions costs and, possibly, insurance costs.[175]

As reported

Section 304(a) provides that in any civil action brought under the bill, the complaint must be filed within 2 years of the time the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. Actions filed more than 2 years after the harm and its cause were or should have been discovered are barred.

If a person with a product liability claim has a legal disability—for example, the person is a minor or is insane—the person may file his or her complaint any time until 2 years after the legal disability ceases. If the filing of a product liability complaint is stayed or enjoined by court order, the running of the 2-year period of limitations is suspended until the stay or injunction is lifted or ceases.

Section 304(b) provides that any product liability action alleging harm, which is not toxic harm,[176] caused by a capital good is barred unless the complaint is served and filed within 25 years of the date of delivery of the product to its first purchaser or lessee

who has not engaged in a business of selling or leasing the product or using the product as a component part. Section 304(c)(1) defines "capital good" as any product or component part of any product, which is both of a character and type depreciable under the Internal Revenue Code of 1954, and (1) used in a trade or business, (2) held for production or income, or (3) sold or donated to a governmental or private entity for the production of goods, for training, for demonstration, or other similar purposes.

This absolute time limitation applies only to capital goods, because the "long-tail" of liability is a more serious problem for these goods, which have a substantially long life, than for most other products. Most injuries involving capital goods occur in the workplace.[177] Because nearly 90 percent of the U.S. labor force is covered by workers' compensation,[178] most of those injured by a capital good after the 25-year period will recover workers' compensation benefits and, thus, will receive some compensation for their harm. For these reasons, the Committee believes that an absolute 25-year time limitation on capital goods will help solve "long-tail" liability problems, without adversely affecting persons who use capital goods.

Most existing State time limitation statutes are considerably shorter than 25 years, averaging about 10 years, and do not distinguish between types of products.[179] Many commentators and a number of witnesses advocate a period shorter than 25 years,[180] arguing that a longer period will be ineffective in resolving the "long-tail" of liability problem. Section 304 establishes a 25-year limitation period to ensure that claimants are not unfairly barred from suing for harms caused by capital goods.[181]

A time limitation is meaningful to the extent that it is definite. Pursuant to section 304(b)(4)(A), the 25-year period specified in section 304 is measured from the date the product was delivered to the first purchaser or lessee who is not engaged in the business of manufacuring or selling the product or using it as a component part of another product to be sold. This period can be measured with certainty and will minimize litigation over when the period begins and ends. As one court said in endorsing the policy of a time limitation, people should be allowed, "after the lapse of a reasonable time, to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability . . ."[182]

With respect to products that are not capital goods, the Committee believes that some kind of limitation is necessary but that an absolute cutoff period may be unfair to injured claimants. As a consequence, section 304(b)(2)(A) provides that a manufacturer or product seller shall not be liable for harm caused by such products, if it is proven by a preponderance of the evidence that the harm was caused after the product's useful safe life.

Section 304 uses the term "useful safe life" (not "useful life," a term which has already acquired a meaning in the law of taxation), because the period in which the product can have some "utility" may be well beyond the period in which the product is "safe." For example, a driver may continue to "use" tires that lack sufficient treads for safety.

As defined in section 304(b)(4)(B), a product's "useful safe life" begins at the time of first use of the product following delivery and extends for the time during which the product normally would be likely to perform or be stored, or both, in a safe manner. A product has exeeded its useful safe life if, after use or storage, it is no longer reasonable to expect that the product would operate without malfunction or increased risk of harm.

This provision offers less relief to defendants than an absolute cutoff, because claims for harms caused by very old products will continue to be brought with the same problems and costs. However, since the useful safe life of products varies, it seems unfair to impose an absolute cutoff that is uniform for all products, regardless of their durability. Section 304(b) balances these interests by establishing a rebuttable presumption as to useful safe life that will minimize transaction costs by permitting summary judgments and directed verdicts in appropriate cases, without unfairly depriving claimants of their right to recover.

Section 304(b)(2)(B) provides that a manufacturer or product seller may be subject to liability for harm caused by a product after its useful safe life if (1) the manufacturer has warranted that the product can be utilized safely for a time longer than the useful safe life: (2) the manufacturer intentionally misrepresents facts about the product or intentionally conceals information about the product and that concealment was the proximate cause of the claimant's harm; or (3) the harm was caused by exposure to a product which first occurred within the useful safe life of the product, even though the harm did not manifest itself until after such useful safe life.

As set forth in section 304(b)(2)(C), there is a presumption in product liability actions that the harm was caused after the useful safe life of the product if the harm was caused more than ten years after the time of delivery of the product. This presumption may be rebutted by a claimant who establishes by a preponderance of the evidence that the product has a longer useful safe life.

Section 304(b(3) provides that any motor vehicle, vessel, aircraft, or railroad used primarily to transport passengers for hire shall not be subject to the time limitations set forth in subsection (b).

Section 304(d) provides that the time limitations in this section do not affect the right of any person to seek contribution or indemnification from the person who is actually responsible for the harm.[183]

SECTION 305—COUNSEL'S LIABILITY FOR EXCESSIVE COSTS

In general

Section 305 directs the court to impose pecuniary sanctions on attorneys whose conduct in bringing, maintaining, or defending a civil action subject to this legislation is calculated to delay resolution of the action or is found by the court not be in good faith. The pecuniary sanctions to be imposed by the court in such circumstances are based on court costs, attorney's fees and expenses incurred as a result of the attorney's bringing baseless claims or unreasonably delaying cases with frivolous defenses.

This section was incorporated into the bill in response to the testimony of many witnesses that the current lawsuit crisis is due, in part, to such conduct on the part of attorneys representing claimants and defendants. Critics of the current product liability system have cited numerous examples in which claims have been brought involing bizarre factual circumstances or tenuous claims of product defects or manufacturer responsibility.[184] Others have argued that injured product users are adversely affected by the Current litigation system because defendants use unreasonable tactics to draw out cases in order to wear down the claimannt, to obtain an advantageous position for settlemant, and to delay payment.

The filing of unreasonable claims and conduct by attorneys representing claimants and defendants to delay resolution of the action results in unnecessary transaction costs. These costs should be borne by the attorney who has engaged in such conduct. The imposition of pecuniary sanctions on such attorneys will have the effect of punishing and deterring such conduct.

Present law

Similar sanctions may be imposed pursuant to Rule 11 of the Federal Rules of Civil Procedure.[185] Rule 11 requires attorneys to sign every pleading, motion, and other paper submitted to the court in a civil action in Federal court. The attorney's signature certifies that he or she has read the document and that, to the best of his or her knowledge, information and belief formed after reasonable inquiry, the document is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If a pleading, motion, or other document is signed in violation of this rule, the court shall impose upon the attorney, or upon the represented party, an appropriate sanction, which may include an order to pay to the other party the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Since a 1983 amendment to Rule 11, Federal courts have become more disposed to imposing sanctions on attorneys for such conduct.[186] For example, Rule 11 sanctions have been imposed on plaintiff's counsel who sued multiple defendants because they did not know which defendant made the particular product and failed to conduct reasonable pre-filing investigation of facts as to the indentity of the responsible manufacturer.[187] Sanctions also have been imposed when plaintiff's counsel filed a complaint in Federal court and the complaint, on its face, lacked diversity jurisdiction.[188]

In addition to Rule 11, Rule 37 of the Federal Rules of Civil Procedure allows sanctions for abuses during discovery, which may be imposed upon the party, the party's attorney, or both.[189]

As reported

Section 305(a) directs the court to impose pecuniary sanctions on any attorney or other person who is admitted to conduct cases in any court of the state in which the action is pending, if the conduct

of such attorney or other person is calculated to delay resolution of the action or is determined by the court (after consideration of the circumstances) not to be in good faith. This subsection is intended to sanction a broad category of conduct—conduct that is unreasonable and not in good faith and conduct calculated to delay resolution of the action. The court has the discretion to set the amount of the sanction, but the sanction for such conduct shall be an amount not less than the total amount of court costs, fees, and expenses (including attorney's fees) reasonably attributable to the conduct. Thus, if an attorney files a motion not in good faith or for the sole purpose of delaying resolution of the action, the sanction shall be an amount not less than the opposing party's costs in opposing such motion.

Section 305(b) specifies that, notwithstanding any other provision of law, attorney's repesenting either claimants of defendants in product liability actions are liable for such sanctions. In addition, section 305(b) provides for sanctions for more specific types of conduct. Sanctions shall be imposed pursuant to subsection (b) if the court finds that claimant's counsel brought the action without a good faith belief that there was a reasonable basis in law and in fact for the recovery of damages, including punitive damage if pleaded. Sanctions shall be imposed on defense counsel if the court determines that defense counsel maintained a defense in an action without a good faith belief that there was a reasonable basis in law and in fact for such defense. Subsection (b) (1) provides that the sanction for such conduct described in paragraph (2) of subsection (b) shall be the amount of costs, fees, and expenses, including attorney's fees reasonably incurred to respond to, proceed with, or resist such action.

Paragraph (3) of subsection (b) provides that such sanction shall not apply if a claim for punitive damages is withdrawn at least 30 days prior to the commencement of trial.

Subsection (c) provides that the sanctions in section 305 shall not be imposed on an attorney for pursuing a novel, but credible, theory of law or defense. It is not the Committee's intent to prohibit counsel from pursuing credible and legally sound extensions of the law, particularly in areas of law that have not been fully developed. It is the Committee's intent, however, to restrain strongly counsel from pursuing claims, defenses, or other tactics that are not credible and not done in good faith.

SECTION 306—RECORD RETENTION

In general

Section 306 imposes sanctions on a party to litigation who has willfully disposed of, destroyed, concealed, altered or removed any records that relevant or may lead to the discovery of evidence relevant to such litigation. This provision is intended to protect the interests of both claimants and defendants in product liability actions. If a party destroys records relevant to litigation, there shall be a rebuttable presumption that the facts to which the records relate are established in a manner adverse to that party. In addition, such parties shall be assessed a civil penalty in an amount not less than $1,000 and shall be required to pay the other party's costs

incurred in proving the record destruction. In a case of non-willful destruction of records, there is no pecuniary sanction, and the court has the discretion to establish the rebuttable presumption of adverse facts.

Present law

Current Federal regulations require persons who manufacture or distribute products to retain records relevant to product liability cases.[190] These regulations specify the type of data that must be maintained. In addition, civil and criminal penalties are imposed for violation of such record retention requirements.[191] For example, the Consumer Product Safety Act [192] requires producers and distributors of consumer products to establish and maintain records that the Consumer Product Safety Commission may require. Various regulations impose record retention requirements on those who manufacture, import or label products such as cellulose insulation,[193] omnidirectional Citizens Band base station antennas,[194] and walk-behind rotary powered lawn mowers.[195] Failure to maintain the required records constitutes an illegal act under Section 19 of the Consumer Product Safety Act (15 U.S.C. 2068), subjecting the manufacturer to both civil and criminal penalties.[196]

Beginning in 17th Century England [197] and continuing in the United States, it has been recognized universally that where one party destroys or fails to produce a document relevant to a case, the trier of fact may infer that the party which prevented the production did so out of fear that the document's content would harm that party. This strong adverse influence against the party who destroyed the document was articulated by Dean Wigmore, the eminent evidence scholar, as follows:

> The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to who [198] contents it is desired to draw an inference.

Federal courts consistently have followed the rule set forth by Wigmore.[199]

The First Circuit set forth the evidentiary rationale for the adverse inference rule in *Nation-Wide Check Corp.* v. *Forest Hills Distributors, Inc.*:

> The evidentiary rationale is nothing more than the common sense observation that a party who had noticed that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it would

> otherwise be. *See* Fed. R. Evid. 401. Precisely how the document might have aided the party's adversary, and what evidentiary shortfalls its destruction may be taken to redeem, will depend on the particular facts of each case, but the general evidentiary rationale for the inference is clear.[200]

The second justification for the adverse inference rule is the need both to deter and punish those who would destory evidence. Permitting the trier of fact draw an adverse inference deters parties destroying evidence.[201]

As reported

Section 306(a) requires any claimant and any person who is a party to a civil action subject to this title who anticipates bringing such an action or who has "notice" that he or she may be made a party to such an action, to retain all material, documents and other data within such person's possession, custody or control that are relevant or may lead to the discovery of evidence relevant to the claim or action. With respect to a claimant, this requirement includes retention of the product alleged to have caused the harm. For the purposes of this section "notice" means knowledge of facts from which one could reasonably infer that a particular individual is contemplating bringing an action for a particular harm.

Penalties are impose on parties who willfully or nonwillfully destroy records required to be retained under subsection (a) of this section or any State or Federal rule, regulation or statute requiring the retention of such material, document or data. Subsection (b) provides that if the court determines that a party has willfully disposed of, destroyed, concealed, altered or removed any such record, there shall be a rebuttable presumption that the facts to which the material, document or data relate are established in a manner adverse to the position of the party who has committed the violation. In addition, the court shall assess a civil penalty against such party in an appropriate amount not less than $1,000 and order such party to pay the other party's costs incurred in proving the violation, including reasonable attorney's fees.

Subsection (c) provides that if the court determines that a party has nonwillfully destroyed such records, and that no other means are available to establish the facts to which the unavailable material, document or data relate, the court has the discretion, in the interest of justice, to establish a rebuttable presumption that the facts to which the material, document or data relate are, for the purposes of such action, established in a manner adverse to the party who has committed the violation.

It is the Committee's intent that the court exercise its discretion to establish a rebuttable presumption of adverse facts only in cases in which there are no other means available to establish the facts to which the unavailable records relate. Because the adverse inference rule is applied under current law only to whose persons who willfully destroy documents,[202] it should not be applied to persons who nonwillfully or unknowingly destroy records unless there are strong policy reasons which outweight the unfairness that the adverse inference rule creates.

The evidentiary rationale for the adverse inference rule is that a party who has willfully destroyed a document must have done so because the contents of the document harmed that party's position. It is an attempt to approximate the truth of the document's contents. Without the element of bad faith, this rationale breaks down and the fact that the evidence was adverse to the party who destroyed it cannot fairly be inferred. Therefore, application of the adverse inference rule in cases of nonwillful destruction is not certain to result in an assumption approximating the truth. Moreover, the second justification for the adverse inference rule—punishment and deterrence—does not exist in the case of nonwillful destruction of records. For these reasons, courts should conservatively apply the discretion to establish an adverse presumption in cases of nonwillful destruction of records.

SECTION 307—UNIFORM STANDARDS FOR OFFSET OF WORKERS' COMPENSATION BENEFITS

In general

Section 307 clarifies the relationship between the workers' compensation system and the product liability system with rules that keep these systems separate, minimize legal costs, and promote safety. Section 307 eliminates the employer's subrogation lien and strengthens employer immunity from tort liability without affecting the employer's obligation to pay workers' compensation benefits. This rule also provides an incentive for the employer to minimize workplace accidents and eliminates transactional costs associated with pursuing the subrogation lien. The employee-claimant obtains from the employer the workers' compensation benefits to which he or she is entitled and may obtain tort damages from the responsible manufacturer reduced by the amount of benefits he or she has been paid. Subtracting the amount of workers' compensation benefits from the product liability judgment prevents double recovery by the employee, and, thus, serves the purpose of the subrogation lien without the associated legal costs. The manufacturer pays for the harm caused by the manufacture's own conduct and the conduct of the employer or coemployee less the amount of workers' compensation.[203]

Present law

Workers' compensation statutes are designed to ensure that an employee injured in the course of his or her employment has a fast and inexpensive way to recover for his or her injury, regardless of who, if anyone, is at fault for causing the injury. The employer automatically pays workers' compensation benefits to an employee injured in the course of employment, without regard to fault. As originally conceived, workers' compensation is a tradeoff: While the employer is liable regardless of fault, the employer is immune from tort liability for the injury. Workers' compensation was, thus, intended to be the employee's exclusive remedy against the employer for work-related injuries.[204] The purpose of the system is to provide swift and certain recovery for injured workers, while maximizing the incentives for employers to maintain a safe workplace.

However, the safety incentive provided by workers' compensation has been undermined by the subrogation lien, which allows an employer to shift the costs of the workers' compensation system to the product liability (tort) system. In most states, an employer can recover the amount or workers' compensation benefits the employer pays to an injured employee through a subrogation lien, if the employee has a successful product liability claim against a manufacturer or product seller. This is done regardless of whether the employer is responsible for the injury.

As one legal scholar has noted:

> The present situation is intolerable. The no-fault workers' compensation system bears no responsibility whatsoever for the employer's faulty conduct. By permitting the subrogation lien in favor of the employer, it does more than protect the workers' compensation system from tort recovery: it protects workers' compensation from itself. It does so by benefiting from the tort recovery system without having to pay allegiance to the principles of the system from which it seeks recovery. The tort system would not allow the third-party action without inquiry into the fault of the parties *inter se*.
>
> This problem has substantial significance because employees implicate employer fault in over half of all employment related product liability claims. Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results Report 10. 61–66 (1978). According to the study, 56.3% of the dollars involved in employment-related product liability claims were paid out in situations where the employer's negligence had been implicated. (Footnote deleted from the original text.) Manufacturers justifiably complain that under most state rules the most guilty part often walks away from the lawsuit without contributing anything to the plaintiff's recovery. Instead, the product liability (tort) system bears the entire cost of the injury.[205]

Some states have gone to the other extreme by permitting employees and manufacturers in product liability actions to recover from the employer. Employees have been permitted in a few States to bring product liability suits against their employers. Although a majority of courts has not accepted this rationale, one line of cases holds the employer liable on the theory that the employer acted in a "dual capacity" both as the employer and as the manufacturer of the product that injured the employee.[206] Another line of cases has broadened the traditional exception to workers' compensation employer immunity that permits claims against employers for intentional torts, such as assault, battery, trespass, and false imprisonment.[207] The rationale for the exception is that employers who purposefully harm their employees should not be immune from tort liability.

In addition, manufacturers have been permitted in a few states to sue employers in contribution and implied indemnity actions on the ground that it was the employer who caused all or a part of the claimant's harm.[208] Other states permit such suits, but limit the

amount recoverable to the employer's workers compensation liability.[209] Most jurisdictions, however, respect the employer immunity concept and do not permit a manufacturer to shift the tort judgment to the employer through a contribution or indemnity action.[210]

In those states, however, where the third-party action has limited the immunity of the workers' compensation system, the third party is able to accomplish through direct action against the employer what the employee cannot. As one commentator has noted, "If there was wisdom in creating a system immune to full scale tort recovery, then it is hard to justify this end-run that subjects the employer to the same liability."[211]

In sum, the current relationship between the workers' compensation system and the product liability system generates substantial and unnecessary legal costs, leads to unfair cost shifting between the two systems, and may reward unsafe workplace practices.

As reported

Section 307(a) specifies how product liability judgments are calculated in actions involving claimants who are entitled to workers' compensation benefits.[212] Any damages awarded would be reduced by the value of part and future workers' compensation benefits received for the same harm. A court or jury determination of workers' compensation benefits shall have no binding effect on and shall not be used as evidence in any other proceeding. This will insure the integrity of the workers' compensation system.[213]

The calculation works as follows. The claimant's total damages for which the defendant would be liable are reduced by the amount of workers' compensation benefits that the claimant is entitled to receive under State or Federal law for the same harm.[214] Judgment is then entered in the amount remaining against the defendant.

Section 307(b) permits a claimant to stay the product liability action until the amount payable as workers' compensation benefits has been determined under the workers' compensation law. Such a stay is to be granted at the sole discretion of the claimant.

Section 307(c) eliminates the employer's subrogation lien—the right of an employer to recover the amount of workers' compensation benefits paid to the injured employee-claimant in a product liability action. This provision does not affect non-product-related subrogation claims, which frequently arise in such industries as the construction industry.

Unless the manufacturer or product seller has expressly agreed to indemnify or hold the employer harmless for harm caused by a product, neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the claimant's recovery from manufacturer or product seller.[215] This provision will eliminate the transaction costs associated with pursuing a subrogation lien.

Subsection (c)(2) provides that the elimination of the subrogation lien set forth in section 307 is not applicable to any civil action involving workplaces covered by a State-operated workers' compensation fund, if the State had adopted, prior to June 3, 1986, a statute

eliminating workers' compensation subrogation liens in cases where the claimant's employer or co-employee has been found to be at fault. This provision exempts the State of Washington's workers' compensation insurance fund.

Section 307(d) eliminates, as well, contribution and indemnity actions by third-party tortfeasors against the employer or coemployee of the claimant. A minority of jurisdictions allows a third-party tortfeasor, such as a manufacturer or product seller, to pursue a claim against the empoyer or coemployee alleging that the employer or coemployee was at fault and should pay all or part of the product liability judgment. Permitting a manufacturer to sue an employer for an employee accident undermines the workers' compensation principle that the employer or coemployee should be immune from tort liability.

Under section 307(d), a manufacturer or product seller is required to pay the judgment rendered against the manufacturer or product seller without shifting any part to the employer. In conjunction with the other provisions of this section, this subsection prohibits employers and manufacturers from suing each other to offset their liabilities. As a result, litigation costs will be reduced substantially, without affecting the interests or rights of the injured employee.

Section 307(e) adds that the bill does not affect any other provision of State or Federal workers' compensation law prohibiting a person entitled to workers' compensation benefits from recovering for harm caused by a product from the employer, coemployee, workers' compensation insurer of the employer, or the exclusive representative of the injured person, in any action other that a workers' compensation claim. Section 307(e) states, too, that the bill is not intended to affect any workers' compensation laws that permit claimants to recover on the basis of a claim of intentional tort by the employer or co-employee. These intentional torts include, for example, assault, battery, trespass or false imprisonment.[216]

Section 307(f) provides that claimant-employees covered by the Longshore and Habor Workers' Compensation Act (33 U.S.C. 901 et seq.) are not affected by section 307. That act guarantees employer tort immunity and, therefore, section 307 is not needed to keep the tort system and the workers' compensation system separate.

SECTION 308—SEVERAL LIABILITY FOR NON-ECONOMIC DAMAGES

In general

Section 308 provides that the liability of each defendant in a product liability action for non-economic damages shall be several only and shall not be joint. Non-economic damages, for the purposes of this section, are subjective, non-monetary losses, including pain and suffering awards. Each defendant shall be liable only for the portion of non-economic damages allocated to it in accordance with its proportionate share of responsibility. The basic policy underlying this section is to address inequitable application of the doctrine of joint and several liability that makes one defendant pay for the misconduct of another.

Joint and several liability was limited originally to situations where defendants had conspired with one another to harm a plaintiff—so-called "concert of action." Today, it has been extended far beyond its original application to situations were defendants' conduct played any role, however minor, in causing a harm. In such circumstances, the full implementation of joint and several liability can have inequitable consequences. When joint and several liability is applied, counsel for a claimant need not pursue a wrongdoer whose conduct played a principal role in causing the harm at issue so long as there is a larger "deep pocket" defendant available. Claimant's counsel can thrust the entire cost of that harm on the "deep pocket" defendant, such as a municipality, even though its participation in the harm was relatively small.

The expansion of the doctrine of joint and several liability in this manner increases the unpredictability of the product liability system and impedes rational insurance ratemaking.[217] The doctrine makes it almost impossible to predict responsibility for unseen and unknown "joint" defendants.

This section is a compromise. It takes a balanced approach to the problem by limiting the application of joint and several liability to situations where it is defensible on public policy grounds—where a person's economic loss would otherwise be uncompensated. This distinction between economic and non-economic loss is consistent with the underlying policy of joint and several liability to make the injured party whole. It does not preclude the claimant from being made whole for actual losses while limiting a defendant's liability for non-economic losses to that portion for which the defendant is responsible.

Present law

The application of joint and several liability must be understood in the context of legal history. This doctrine holds one person responsible for another's conduct. It arose at common law in connection with procedural joinder of parties. At first, joinder was limited and was usually permitted when two or more defendants had conspired to harm a claimant—when they had engaged in "concert of action" by wrongfully pursuing a common scheme or plan that was likely to result in injury to another. Joint and several liability meant that the persons who acted in concert were equally at fault and jointly responsible for the harm; thus, the injured person could recover damages from any one of them.

When procedural rules were expanded to permit joinder of all persons whose wrongful conduct may have contributed to a harm, courts adopted the substantive principle of joint and several liability to hold each party responsible for the entire harm. Courts would only apportion responsibility severally when the claimant's injuries could be clearly separated, e.g., when one defendant injured the claimant's arm and another defendant injured the claimant's leg. But when two or more defendants' wrongful conduct combined to cause an indivisible harm, each was held jointly liable.

Such joint and several liability was applied, because the courts were reluctant to apportion fault and often could not do so.[218] Because fault was not apportioned, the contributory negligence defense was a complete bar to recovery if the injury was in any part

attributable to the claimant's fault, and there was no contribution among tortfeasors. In modern times, however, these barriers have all but disappeared with the evolution of the doctrines of comparative negligence and contribution between tortfeasors.[219]

Today, courts can and do apportion responsibility. Forty four states have adopted some form of comparative negligence.[220] Over the years, however, the doctrine of joint and several liability has been expanded to apply even when the defendants in a lawsuit acted independently without concert of action.[221] Such joint liability becomes more inequitable when merged with comparative negligence because a defendant can be jointly liable even when the claimant is substantially at fault. The inequity is particularly acute when a minimally responsible defendant is forced to pay the entire amount of damages simply because he or she has the "deep pocket," and other persons more responsible for the harm have no assets or simply have not been pursued by claimant's counsel.[222]

In response to this unfairness, a growing number of states have abolished or modified the doctrine of joint and several liability.[223] In June 1986, those voting in a California state referendum approved an initiative measure to abolish joint and several liability with respect to non-economic damages.[224] Section 308 is modeled on that proposal.

As reported

Sections 308 (a) and (b) limit each defendant's liability for non-economic damages to that defendant's percentage of responsibility as determined by the trier of fact. The result is that, in any product liability action, the liability of each defendant for non-economic damages shall not be joint and several.

The Committee anticipates that in most cases the percentage determination required by this section will not be subject to an exact mathematical computation. Rather, it will be based on the common sense approximation assigned to it by the jury or by the court. It should be left "to the good sense of the jury, as reasonable [persons], to form from the evidence the best estimate that can be made under the circumstances." [225]

In determining the percentage of each defendant's liability, the trier of fact should take into consideration the proportionate share of each party's responsibility for the total harm caused, including that portion attributable to the claimant. The focus of the inquiry should be on the defendant's "responsibility." For example, if a defendant's share of responsibility for the harm is found to be 25 percent, that defendant is liable for 25 percent of the non-economic damages.

In the past, joint and several liability has been imposed where the harm was found to be indivisible. The "indivisibility" of the harm should not affect the operation of this section; the relevant focus should be each party's proportionate share of responsibility in bringing about the harm, even though the harm, itself, well may be "indivisible" (i.e., a death).

Section 308 does not specify who has the burden of proof as to apportionment of non-economic loss. Based on the evidence presented, the trier of fact should apportion responsibility among all parties.[226] All the parties will have an opportunity to present their

case to the trier of fact as to the appropriate apportionment of responsibility, so that liability can be assigned based on that apportionment. The trier of fact shall make a determination as to apportionment without a requirement that any particular party "prove" which apportionment formula should be applied.

It is the Committee's intent that responsibility should be apportioned for the purposes of this section among all persons who are parties to the action at the conclusion of the trial and persons who were parties to the action and have entered into settlement agreements with the claimant.[227] Courts should apply existing law with regard to the effect of settlement on the judgment and the settlor, but, for purposes of apportioning responsibility under subsection (b), the responsibility of the settlors who were parties should be included in the apportionment.

Subsection (c)(1) defines "non-economic damages" for the purposes of section 308 and includes an illustrative, non-exhaustive list of examples.

Section 308 limits joint and several liability in product liability cases. During Committee consideration of this provision, however, it was pointed out that this limitation could establish dual standards of joint and several liability in states which did not apply the standards of this section to non-product liability defendants. It was suggested that such dual standards would encourage procedural maneuvers by both claimants' and defendants' counsel in an attempt either to escape or invoke the application of this section.

Particular concern was expressed that under dual standards, a claimant's counsel might seek recovery in a "non-product liability action" in order to circumvent the restricted application of joint and several liability. An example was given of a case in which an injury was caused by a defective, unstable vehicle overturning on a negligently constructed road. In this hypothetical, it was said that the claimant's attorney might sue only the state government, which was responsible for the road, and not the vehicle manufacturer. By excluding the product manufacturer, it was suggested that the claimant could avoid the application of section 308 and subject the defendant state government to joint and several liability for all damages.

This hypothetical, however, fails to consider that through legitimate impleader practices, the defendant state government probably could avoid that result.[228] Section 308(c)(2) makes this clear. It provides that, for the purposes of this section, a product liability action includes "any action involving a claim, third-party claim, cross-claim, counterclaim or contribution claim in a civil action in which a manufacturer or product seller is found liable for harm caused by a product."

This subsection gives non-product liability defendants the protection of section 308 whether the product manufuacturer or seller is an original party to the suit or brought in through impleader. To make the point explicit, the Committee added the words "third-party claim" to subsection (c)(2). It is the Committee's expectation that in legitimate poduct liability cases, impleader of third party product-related defendants will be permitted when it appears that claimant's counsel has attempted to limit the scope of the com-

plaint or to engage in any other tactic for the purpose of avoiding the application of section 308.

The Committee is particularly sensitive to the "deep pocket" problem faced by states, municipalities and other public entities that are subjected to joint and several liability in product liability actions. It is the Committee's intention that in such actions the liability of these entities and other defendants for non-economic damages shall be several only and shall not be joint. Section 308(c)(2) resolves the Committee's concern that a claimant should not be able to avoid the application of this section by clever pleadings and other procedural manuevers that enable them to recover from the municipal "deep pocket."

On the other hand, the Committee has not extended the application of this section beyond cases which involve the liability of a manufacturer or product seller. The section only applies when a manufacturer or product seller is found liable for harm caused by a product. This requirement of actual liability was added to section 308(c)(2) to discourage impleader of a manufacturer or product seller by a third-party plaintiff for the sole purpose of invoking this section and its limitation on joint liability. The Committee seeks to avoid purely tatical impleader practices of this nature. It is the intent of the Committee that procedural devices shall not be used to limit or expand improperly the application of section 308.

Section 308 limits the doctrine of joint and several liability as applied to non-economic damages in product liability actions. This section, however, does not preempt other limitations on joint and several liability with respect to economic damages, which have been imposed by individual jurisdictions. Indeed, the Committee recognizes that a number of jurisdictions have enacted more sweeping reforms with respect to joint and several liability.[229] These reforms are in no way affected by the Committee's action.

SECTION 309—FORUM NON CONVENIENS

In general

This section establishes a uniform doctrine of *forum non conveniens* to be applied in civil actions subject to the bill. This doctrine provides that even when venue is proper and the parties are subject to jurisdiction, a court may decline to exercise jurisdiction if the convenience of the parties and the interests of justice establish that an alternative forum is more appropriate. In addition, section 309 establishes a presumption that actions brought by foreign citizens which arise out of injuries that occur in foreign jurisdictions should be adjudicated in those jurisdictions.

Present law

The doctrine of *forum non conveniens* gives courts discretionary power to decline jurisdiction when the convenience of the parties and the interest of justice would be better served if the action were brought and tried in another forum.[230] The doctrine presupposes at least two forums in which the defendant is subject to service of process and furnishes criteria for choice between such forums.[231] It is applicable only when the court in which the action has been

brought has both subject matter and personal jurisdiction, and is a proper venue for the action.[232]

The doctrine is applied when the claimant's choice of a forum is found to be inappropriate because the forum is distant from the accident or injury giving rise to the action, because it lacks sufficient interest in the action, or would create a hardship on the parties. Factors that are considered in determining whether the forum is inconvenient include the location of the injury, the location and practical availability of records, witnesses, and other evidence relevant to the litigation, the possibility that the application of law of another forum may be difficult for the chosen forum or create confusion for the jury, and the availability of an alternative forum.[233]

Under the traditional doctrine of *forum non conveniens,* courts are reluctant to disturb a claimant's choice of a forum unless a strong showing is made by the defendant that the forum is not convenient. There is a presumption in favor of the claimant's choice of forum that may be overcome by a showing that the parties' interests and the forum's interests clearly point to an alternative forum.[234]

However, the U.S. Supreme Court has held in *Piper Aircraft Co.* v. *Gilbert,* 454 U.S. 235 (1981), that this presumption applies with less force when the claimant is a citizen of a foreign country. As the court explained:

> When the home forum has been chosen, it is reasonable to assume that this choice, is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.[235]

In the *Piper Aircraft* decision, the Supreme Court noted a number of factors that will rebut the presumption in favor of the claimant's chosen forum when the claimant is foreign. These factors include that private interests of the parties, the location of evidence and witnesses relevant to the action, and such factors relating to the public interest as whether application of foreign law would be confusing to a jury and the foreign country's interest in the litigation, as well as the administrative difficulties of exercising jurisdiction in American courts. An important inquiry is whether the United States has a sufficient interest in the litigation to justify the commitment of judicial time and resources that would be required if the case were tried in this country.[236]

Moreover, the Supreme Court established clearly that claimants may not defeat a *forum non conveniens* motion merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the claimant than the law of the chosen forum.[237] In reaching this conclusion, the Court noted the many problems that are created by opening up American courts to claims brought by foreign citizens arising out of actions that occur outside this country. American courts are extremely attractive to foreign claimants because of United States substantive rules of law, the availability of jury trials, the contingency fee system, and the opportunities for extensive discovery. Opening American courts to

foreign claims would increase the flow of litigation and further congest American courts which already are congested.[238]

The Supreme Court's *Piper Aircraft* decision, thus, makes it clear that under existing law there are significant factors that warrant rejection of a foreign citizen's choice of a United States forum to litigate a claim involving injuries incurred in a foreign jurisdiction. Consideration was given to these factors recently in a case involving a large number of claims brought by Indian citizens in United States courts arising out of the accident in Bhopal, India. In that case, a Federal District Court in New York dismissed actions brought here by and on behalf of Indian citizens, on the basis of the rule enunciated by the Supreme Court in the *Piper Aircraft* decision.[239]

The Federal District Court found that the documentary evidence concerning the design, manufacture and operation of the Bhopal plant are relatively more accessible in India than in the United States, that relatively fewer witnesses reside in the United States than in India, that almost all of the claimants reside in India, and that the administrative burden of this immense litigation on an American court would result in excessive costs to American taxpayers. Furthermore, the Court stated that "No American interest in the outcome of this litigation outweighs the interest in India in applying Indian law and Indian values to the task of resolving this case . . . . The Indian interests far outweigh the interests of citizens of the United States in the litigation." It was the court's view that "to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role."[240]

A related problem with respect to product liability litigation involving foreign citizens is that the opening up of American courts to foreign claims puts American businesses at a competitive disadvantage in the international market. As noted in a recent report on the product liability problem:

> Because of the broad extraterritorial jurisdiction of United States courts, American businesses operating in other countries are exposed to the liability standards of this country. By contrast, indigenous businesses in foreign countries will face less tort liability for identical conduct because any suits against those businesses must be filed in the foreign country. This competitive disadvantage also threatens jobs for American workers.[241]

The *forum non conveniens* standard set forth in section 309 is, thus, a reflection of existing law. It establishes a strong presumption that claims of foreign citizens for harm occurring outside the United States should be brought in a foreign jurisdiction. As a consequence, this provision will reduce the competitive disadvantage of American businesses and relieve the crowded dockets of American courts.

As reported

Section 309 provides that any court in which a civil action subject to this bill is commenced shall decline to exercise jurisdiction if the court determines that the convenience of the parties and the interests of justice dictate that the action should proceed in another State or foreign jurisdiction. Such a court also may decline to exercise jurisdiction if it determines that the claimant has taken up residence in the State in which the court is located primarily for the purpose of invoking the jurisdiction of the court.

This section reflects existing law with respect to the doctrine of *forum non conveniens*. Thus, a court should dismiss or transfer an action on the basis of *forum non conveniens* if the witnesses, documents, and other evidence relevant to the action are located primarily in another jurisdiction, and if retention of jurisdiction in the claimant's chosen forum would create undue hardship or costs for the defendant, or if the court's interest in litigation is less than the interest of another jurisdiction. In addition, if the court finds that a claimant has changed his or her residence to the forum principally for the purpose of invoking the forum's jurisdiction with respect to the action, the court should dismiss or transfer the action to avoid forum shopping that is not in the interests of justice.

If a product liability action is brought by or on behalf of a foreign citizen and arises out of an injury which occurred in a foreign jurisdiction, section 309 establishes a very strong presumption that the action should proceed in a foreign jurisdiction and not in the United States. This presumption is rebuttable only by "clear and convincing evidence" [242] that the action should proceed in the United States.

In determining whether the evidence is sufficient to rebut this strong presumption, courts should be guided by the precedents established in the *Piper Aircraft* decision and such other recent decisions as that in the Bhopal case. For example, there must be clear and convincing evidence that the witnesses, documents, records, and other material relating to the action are more accessible in the United States, that a United States court would be able to apply foreign law without confusing the jury, and that the United States has a sufficient interest in the litigation to outweigh the foreign jurisdiction's interest in applying its own law and values to the case and in trying the case in its own courts. The fact that American law and procedure would be more favorable to a foreign claimant is not a sufficient basis for rebutting the presumption established by this section.

SECTION 310—ADMISSIBLE EVIDENCE

In general

Section 310(a) states the general rule that all relevant evidence is admissible in civil actions brought pursuant to this bill, with certain exceptions, and that evidence which is not relevant is not admissible. A court may exclude relevant evidence if it would create undue prejudice, confusion, or delay, is impermissible hearsay, or is subject to a privilege under applicable state law.

Section 310(b) states the rule, followed by many courts, that evidence of a repair or improvement in the safety of a product after the time when harm occurred is not admissible to prove liability.

Present law

Rule 402 of the Federal Rules of Evidence[243] states that all relevent evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the Federal Rules of Evidence, or by other rules prescribed by the Supreme Court pursuant to statutory authority, and that evidence which is not relevant is not admissible. Rule 402 has been adopted by the states without substantive change, except that most states have included a reference to their own statutes and constitutions.[244] The Federal Rules of Evidence that follow Rule 402 require the exclusion of evidence despite its relevancy because of particular policy considerations. For example, relevant evidence is not admissible if it is subject to a privilege, because of specific requirements with respect to opinions and expert testimony, or if it is hearsay not falling within a hearsay exception.[245]

Rule 407 of the Federal Rules of Evidence, which incorporates the exclusionary rule, states that evidence of remedial measures taken after an event occurs is not admissible to prove negligent or culpable conduct in connection with that event.[246] Rule 407 does not require the exclusion of evidence of remedial measures when offered for another purpose such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The overwhelming majority of Federal Circuit Courts apply Rule 407 in all product liability actions regardless of whether the underlying theory of liability is negligence or strict liability.[247] The courts which exclude evidence of remedial measures in strict liability cases as well as negligence cases interpret the words "negligent or culpable conduct" as referring to the concept of *liability* in general and not as a basis for carving out an exception for strict liability actions. A number of jurisdictions have refused to apply Rule 407 in strict liability cases.[248] The courts generally reason that evidence of a subsequent remedial measure is inadmissible under Rule 407 only where used to prove "negligent or culpable conduct" and that, because strict liability does not focus on such conduct, the evidence is admissible in strict liability actions.

All of the reasons for excluding evidence of remedial measures in negligence cases apply with equal force in strict liability cases. First, in many cases evidence that a product has been improved in its design or warnings is not relevant to the issue of liability, because liability is judged on the basis of the condition of the product at the time the product was sold rather than at a subsequent point in time.[249] Evidence of a subsequent product improvement creates the clear risk that the jury will focus on later events, rather than the relevant knowledge of the manufacturer at the time of production. Evidence of a product improvement, if admitted, may lead a jury to infer that the changes would not have been made if the product was reasonably safe or had adequate warning at the time of manufacture. Second, exclusion of such evidence will encourage remedial safety measures and improvement in product safety. A

rule that permits evidence of remedial measures to be introduced in a product liability action involving an older product may deter manufacturers and product sellers from taking such measures by creating a legitimate fear that the introduction of the evidence would have an adverse impact on them in litigation involving the product.[250] Third, exclusion of such evidence promotes fairness. It is unfair to place those manufacturers or product sellers who improve their products in a worse position than those who do not. The manufacturer or product seller who did not improve the manufacturer's or product seller's product will not be penalized by the use of such evidence against it. A rule that permits evidence of remedial measures to prove liability would put the manufacturer or product seller who fails to improve its product in a better position at trial than the manufacturer or product seller who improves its product.

As reported

Section 310(a)(1) states the general rule that all relevant evidence is admissible in any civil action brought pursuant to this bill, except as otherwise provided by the United States Constitution, an act of Congress, or any other rule prescribed by the Supreme Court of the United States pursuant to statutory authority, or, in cases brought in Federal court based on diversity of citizenship, except as provided in the Federal Rules of Evidence. Evidence which is not relevant is not admissible in any such action.

The relevancy provisions of section 310(a) are intended to assure that essential and reliable evidence is presented in product liability disputes by both claimants and defendants. The Committee did not undertake to draft a comprehensive rule on relevancy. Rather, in section 310(a), the Committee has adopted the general relevancy rule in the Federal Rules of Evidence together with several limitations on the admissibility of relevant evidence that are recognized under State and Federal rules of evidence.

Section 310(a)(2) lists these limitations on the general relevancy rule. Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In addition, relevant evidence may be excluded by the court if such evidence is inadmissible hearsay under applicable state law or if the privilege of a witness, person, government or State under applicable state law provides for the exclusion of such evidence.[251]

In section 310(a)(3), the term "relevant evidence" is given the meaning used in Federal Rule of Evidence 401. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without such evidence.

Section 310(b) states the general rule that evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove liability in a product liability action, with respect to the event. This provision does not refer to negligence or culpability, as does Rule 407; as a consequence, it avoids the issue raised in cases that distin-

guish strict liability actions from negligence-based actions when applying the rule. If, for example, a manufacturer's product results in a harm and the manufacturer subsequently modifies the product's design, evidence of such modification is not admissible to prove the manufacturer's liability in any civil action alleging harm caused by the product.

Section 310(b) does not require the exclusion of evidence of subsequent remedial measures when offered to prove ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. Thus, for example, if a defendant's witness expressly denies the feasibility of incorporating a remedial measure in a product design or formulation, evidence of a subsequent remedial measure actually taken by the defendant may be admitted to impeach the witness. However, evidence of remedial measures or product improvements should not be admitted to prove these issues if other evidence regarding these matters is reasonably available.

SECTION 311—DEFENSES INVOLVING INTOXICATING ALCOHOL OR DRUGS

In general

Section 311 establishes a complete defense for manufacturers or product sellers in actions subject to the bill, if the claimant was under the influence of intoxicating alcohol or any drug and such condition was more than 50 percent responsible for the claimant's harm. The Committee believes that barring liability in such cases is sound public policy. The use of intoxicating alcohol and drugs for non-medicinal purposes by a person creates serious risks to the safety of such a person and to the safety of others. Drunk driving is major cause of death on our highways. A person who impairs his or her ability to act safely should not be able to shift the cost of such risks onto the manufacturer or seller of a product used by such person and ultimately onto society itself. This rule will encourage persons to take responsibility for their own safety and the safety of others.

The Committee has chosen the rule that would require that claimant be more than 50 percent responsible so there would be no question as to the principal cause of the harm—alcohol or drug use. In order to avoid the inequitable shifting of liability onto other codefendants, such as municipalities, the Committee also has made section 311 applicable only in cases where manufacturers or product sellers are subject to liability and no liability exists against those condefendants who are not manufacturers on product sellers.

Present law

Recently enacted tort legislation in the State of Washington establishes a complete defense to an action for damages for personal injury or wrongful death if the person injured or killed *was* under the influence of intoxicating liquor or any drug and such condition contributed more than 50 percent to his or her injuries or death.[252] This provision was included as part of Washington tort reform legislation that was enacted "in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance."[253] It is the Committee's belief that

a provision of this nature is an important component of Federal product liability reform.

The very strong public policy underlying this rule justifies preemption of conflicting state laws—it is a national policy of overriding importance to the American public. Thus, if a state has pure comparative fault as its general rule of tort law, this provision will prevail if claimant was under the influence of alcohol or any drug and such condition was more than 50 percent responsible for the harm. On the other hand, if a state retains the contributory negligence defense and believes that a person's claim should be barred if the person's fault in any way contributed to his or her harm, this bill is not preemptive. It only addresses situations in which, currently, a person could bring a successful claim when such person was more than 50 percent responsible due to drugs or alcohol.

As reported.

Section 311(a) provides that in any civil action subject to this bill in which all defendants are manufacturers or product sellers, such defendants may assert as complete defense that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than fifty percent responsible for such claimant's harm. This complete defense to liability for manufacturers and product sellers only applies in cases in which all defendants are manufacturers or product sellers, because otherwise the result might be to release manufacturers or product sellers from liability, while leaving other defendants (such as municipalities) liable for the claimant's entire loss. While the Committee believes that it is unjust for an intoxicated person who is primarily to blame for his or her own harm to recover in tort for his or her injuries, it would be still more unjust to release some defendants from liability in such a case while leaving others to bear the entire amount of damages.

Section 311(b) provides that in any civil action in which some, but not all, of the defendants are manufacturers or product sellers, and the trier of fact determines that no liability exists against those defendants who are not manufacturers or product sellers, the court shall enter a judgment notwithstanding the verdict in favor of any defendant manufacturer or product seller, if it is proved that the claimant's intoxicated condition was more than 50 percent responsible for such claimant's harm. Thus, if a manufacturer or product seller was barred from invoking section 311(a) because of the presence of codefendants who were not manufacturers or product sellers, and those codefendants were found not to be liable, the manufacturer or product seller could still be released from liability pursuant to this provision.

Section 311(c)(1) provides that the determination of whether a person is under the influence of intoxicating alcohol shall be made pursuant to applicable state law. For example, if applicable state law provides that a particular amount of alcohol in a person's blood is evidence that the person was under the influence of intoxicating alcohol, that standard shall apply. Paragraph (2) of subsection (c) defines the term "drug" as any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant.

TITLE IV

Title IV of the bill requires the Secretary of Commerce to provide Congress with an annual report analyzing the impact of this legislation on insurers which issue product liability insurance. The Secretary shall collect all data considered necessary for this report, but to the maximum extent possible shall obtain such information from existing sources, such as State insurance regulators, recognized insurance statistical agencies, and court administrators.

SECTION 401—PRODUCT LIABILITY INSURANCE REPORTING

In general

The Committee recognizes the need for accurate reporting of product liability insurance data to assess the reforms adopted in this legislation. Section 401 would require the Secretary of Commerce to report annually to Congress on the impact of the bill upon insurers which issue product liability insurance, as well as on self-insurers, captive insurers, and risk retention groups. This section also requires the Secretary to collect data necessary for this report.

The Secretary is required to promulgate regulations pertaining to the data collection process. These regulations shall require the reporting of information sufficiently comprehensive to make possible a full evaluation of the impact of the bill. Taking into account methods to minimize the paperwork and cost burdens on insurers and the Federal Government, these regulations shall provide that, to the maximum extent practicable, such information is to be obtained by the Secretary from existing sources.

In light of the scale of the data collection effort section 401 contemplates, and in view of the fact that section 401 makes no provision for an authorization of appropriations, the Committee intends that the Secretary utilize, wherever possible, existing sources of insurance industry data.

Present law

At present, there are a number of different sources that collect product liability insurance data. For example, each insurer is required to file an Annual Statement in each state in which it is licensed to do business. The Annual Statement contains a number of exhibits specified by the National Association of Insurance Commissioners (NAIC), an organization of state insurance regulators. The purpose of the Annual Statement is to ascertain the solvency of the insurer. Since 1979, each insurer has been required to file a "Product Liability Supplement" with its annual statement. This industry data, collected on a state-by-state basis, specifies direct premiums written and earned; direct losses paid, incurred and unpaid; loss adjustment expenses; and dividends paid or credited to policyholders on direct business.

In addition, insurance companies report statistical data through statistical agencies which provide information to both insurers and insurance regulators about the adequacy of rates. The largest statistical agency serving the property/casualty insurance industry, the Insurance Services Office, for example, employs nearly 400

people and has a budget of nearly $40 million per year solely to compile insurance statistics. Among other things analyzed by such agencies are claim frequency and severity. This is necessary in order to determine whether a premium charged by an insurer is excessive, inadequate or unfairly discriminatory.

During consideration of the bill, Committee members repeatedly expressed a need for a consolidated, comprehensive product liability insurance data base that could be used to assess the effect of any product liability reforms. Members questioned whether under existing insurance industry practices sufficient data is available to evaluate adequately the impact of product liability reforms on insurance rates and insurers' practices. Concern was expressed about the need for specific data as to the amounts paid out by insurers, as the result of adjudication, for economic, non-economic, and punitive damages. With respect to claims paid, concern was expressed as well about the need for more detailed and current data about settlements, transaction costs incurred by insurers, and the time period that elapses before a claim is actually paid by an insurer.

In a June 18, 1986 letter to the Committee Chairman, Senator Danforth, indicated that the States are willing and able to provide the Committee with the "comprehensive data specific to the product liability line of insurance" the NAIC has obtained from the insurance industry on a state-by-state, company-by-company basis since 1979. NAIC expressed its hope that the Committee would use this pool of data "rather than mandate the reporting of either duplicative, coextensive data, or selective information productive of a partial—and misleading—data base." NAIC also indicated its willingness to consider "some refinement of our standardized reporting procedures," should the needs of the Committee "transcend what is currently available from the NAIC."

As reported

Section 401 (a) requires the Secretary of Commerce to present to Congress before June 30 of each year after the date of enactment of the legislation a report analyzing the impact of this legislation on insurers which issue product liability insurance. This report shall analyze the impact of the bill on insurers that issue product liability insurance either separately or in conjunction with other insurance, including self-insurers, captive insurers, and risk retention groups.

It is the Committee's intent tha the annual report prepared by the Secretary shall be a comprehensive analysis of the full impact of the bill on product liability insurers. This report should include the following information about such insurers:

(A) the total number of policies and the total amount of premiums written and earned as a result of entering into product liability insurance policies;

(B) the total number and total amount of claims reported but not yet paid by such insurers;

(C) the total number and total amount of claims not reported and not yet paid but expected to be paid by such insurers;

(D) the total number and total amount of claims paid by such insurers as a result of judicial proceedings in which a verdict is rendered, and the total amount of such verdicts;

(E) the total number and total amount of claims paid as a result of settlements by such insurers prior to the verdict, including settlements in connection with or outside of judicial proceedings, broken down separately for settlements before and after a complaint is filed;

(F) the total amount of economic damages, non-economic damages (including compensation for non-pecuniary loss), and punitive damages paid by such insurers, as a result of any judical proceeding in which a verdict is rendered, and the amount of such verdicts;

(G) the standard used to determined exposure bases;

(H) the actual expenses paid by such insurers in connection with reported claims under such product liability insurance policies, allocated separately for attorney's fees and other loss adjustments;

(I) the actual expenses outstanding in connection with claims under such product liability insurance policies, allocated seperately for attorney's fees and other loss adjustments;

(J) the total number and total amount of product liability insurance policies cancelled or not renewed by such insurers; and

(K) the investment income of such insurers allocable to product liability, using estimates where necessary.

The Secretary shall include in the annual report a distribution of claims, designating the amount paid for economic, non-economic and punitive damages in all claims as a result of settlements or judicial proceedings. The Secretary shall designate in the report the claims where economic damages paid were less than $50,000, more than $50,000, but less than $100,000, more than $100,000, but less than $500,000, more than $500,000, but less than $1,000,000, and more than $1,000,000. The Committee believes that in order to present and analyze fully the impact of the bill on insurers, the data contained in the annual report also should be broken down by class of product and by state, to the extent possible.

Section 401(b) requires the Secretary to collect from each insurer all data considered necessary by the Secretary to present and analyze the impact of this bill on such insurers. Section 401(c) requires the Secretary within 120 days after enactment of this legislation to issue regulations to implement the purposes and provisions of section 401.

These regulations set out clear guidelines to be followed by the Secretary in collecting from product liability insurers data necessary for the annual report. Section 401(c) provides that these regulations shall (1) require the reporting of information sufficiently comprehensive to make possible a full evaluation of the impact of this legislation on such insurers, (2) specify the information to be provided by such insurers and the format of such information, taking into account methods to minimize the paperwork and cost burdens on such insurers and the Federal Government, and (3) provide, to the maximum extent practicable, that such information is obtained from such existing sources as State insurance commissioners, recognized insurance statistical agencies, the Administrative Office of the United States Courts and the National Center for State Courts.

The Committee intends that, pursuant to these guidelines, the Secretary shall utilize, wherever possible, existing sources of data. For example, with respect to commercial insurers, the Secretary may utilize insurance industry financial and statistical data available from such organizations as NAIC, and such recognized insurance statistical agents as the A.M. Best Company, and the Insurance Services Office. With respect to self-insurers, the Secretary may rely on business trade associations, many of which routinely compile data on their particular industry.

Moreover, with respect to data on judgments and settlements, the Secretary may rely on such organizations as the National Center for State Courts and the Administrative Office of the U.S. Courts. It would make little sense to seek from insurers, self-insurers and risk retention groups data on numbers of court-approved product liability settlements and judgments, and the amount and apportionment of damages in these cases, if this data can be obtained from court administrators.

The Committee stresses that data required for the annual report is to be collected from insurers only when it is not available elsewhere. The Secretary of Commerce is to require insurers to report directly only when existing information from all sources is inadequate and cannot reasonably be refined.

Section 401(c) requires the Secretary of Commerce to minimize the paperwork and cost burden of product liability insurance reporting on both insurers and the Federal government. In part, this can be accomplished by the specific mandate that the Secretary obtain information from existing sources, to the maximum extent possible. In fulfilling the purpose of this subsection (c), however, the Secretary may delineate additional means of reducing the paperwork and cost burden of carrying out this section. This approach will fulfill the requirements of the Paperwork Reduction Act of 1980, as well as demonstrate fiscal responsibility in light of the need to reduce the Federal budget deficit.

Section 401(d) gives the Secretary authority to subpoena witnesses and records related to the report required under this section from any place in the United States. If a witness disobeys such a subpoena, the Secretary may petition a Federal district court to enforce such subpoena. The court may punish a refusal to comply with such a subpoena as contempt of court.

Rollcall Votes in Committee

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of the Product Liability Reform Act:

On amendment offered by Senator Gore regarding the standard of conduct necessary to justify an award of punitive damages:

YEAS—5	NAYS—12
Mr. Gorton	Mr. Danforth
Mr. Hollings	Mr. Packwood [1]
Mr. Inouye [1]	Mr. Goldwater [1]
Mr. Riegle	Mrs. Kassebaum
Mr. Gore	Mr. Pressler
	Mr. Stevens [1]

Mr. Kasten
Mr. Trible
Mr. Long
Mr. Ford
Mr. Exon
Mr. Rockefeller

[1] By proxy.

On motion to adopt a staff working draft, as amended to delete a section regarding admissibility of evidence, as the basis for further consideration and amendment:

YEAS—16	NAYS—1
Mr. Danforth	Mr. Hollings [1]
Mr. Packwood [1]	
Mr. Goldwater [1]	
Mrs. Kassebaum	
Mr. Pressler	
Mr. Gorton	
Mr. Stevens [1]	
Mr. Kasten	
Mr. Trible	
Mr. Long	
Mr. Inouye [1]	
Mr. Ford	
Mr. Riegle	
Mr. Exon	
Mr. Gore	
Mr. Rockefeller	

[1] By proxy.

On amendment offered by Senator Pressler regarding joint and several liability for non-economic damages:

YEAS—10	NAYS—6	PRESENT—1
Mr. Danforth	Mr. Packwood [1]	Mr. Riegle
Mr. Goldwater [1]	Mr. Gorton	
Mrs. Kassebaum	Mr. Hollings [1]	
Mr. Pressler	Mr. Inouye	
Mr. Stevens [1]	Mr. Ford	
Mr. Kasten	Mr. Gore	
Mr. Trible		
Mr. Long [1]		
Mr. Exon		
Mr. Rockefeller		

[1] By proxy.

On amendment offered by Senator Kasten to place limitations on contingency fees:

YEAS—5	NAYS—12
Mr. Goldwater [1]	Mr. Danforth
Mr. Pressler	Mr. Packwood [1]

Mr. Kasten
Mr. Trible [1]
Mr. Long [1]

Mrs. Kassebaum
Mr. Gorton [1]
Mr. Stevens [1]
Mr. Hollings
Mr. Inouye
Mr. Ford
Mr. Riegle [1]
Mr. Exon
Mr. Gore
Mr. Rockefeller

[1] By proxy.

On amendment offered by Senator Kasten regarding attorney contingency fee agreements and attorney disclosures:

YEAS—6

Mr. Goldwater [1]
Mr. Pressler [1]
Mr. Kasten
Mr. Trible [1]
Mr. Long [1]
Mr. Exon

NAYS—11

Mr. Danforth
Mr. Packwood [1]
Mrs. Kassebaum [1]
Mr. Gorton
Mr. Stevens [1]
Mr. Hollings [1]
Mr. Inouye
Mr. Ford
Mr. Riegle [1]
Mr. Gore
Mr. Rockefeller

[1] By proxy.

On amendment offered by Senator Kasten to establish uniform standards for manufacturers' liability:

YEAS—6

Mr. Goldwater [1]
Mrs. Kassebaum [1]
Mr. Pressler [1]
Mr. Kasten
Mr. Trible [1]
Mr. Long [1]

NAYS—10

Mr. Danforth
Mr. Packwood [1]
Mr. Gorton
Mr. Hollings [1]
Mr. Inouye
Mr. Ford
Mr. Riegle [1]
Mr. Exon [1]
Mr. Gore
Mr. Rockefeller

[1] By proxy.

On amendment offered by Senator Danforth regarding whether the judge or jury is to determine the amount of punitive damages:

YEAS—6

Mr. Danforth
Mr. Pressler [1]
Mr. Kasten
Mr. Trible [1]
Mr. Ford
Mr. Exon

NAYS—10

Mr. Packwood [1]
Mr. Goldwater [1]
Mrs. Kassebaum
Mr. Gorton
Mr. Stevens
Mr. Hollings
Mr. Inouye [1]
Mr. Riegle [1]

Mr. Gore
Mr. Rockefeller

[1] By proxy.

On amendment offered by Senator Kasten to place a limitation on the amount of punitive damages that may be awarded:

YEAS—6	NAYS—11
Mr. Goldwater [1]	Mr. Danforth
Mr. Pressler [1]	Mr. Packwood [1]
Mr. Kasten	Mrs. Kassebaum
Mr. Trible [1]	Mr. Gorton
Mr. Long [1]	Mr. Stevens [1]
Mr. Exon	Mr. Inouye [1]
	Mr. Ford
	Mr. Riegle [1]
	Mr. Rockefeller

[1] By proxy.

On amendment offered by Senator Danforth to provide an expedited means of settlement:

YEAS—10	NAYS—7
Mr. Danforth	Mr. Packwood [1]
Mr. Goldwater [1]	Mr. Gorton
Mrs. Kassebaum [1]	Mr. Hollings
Mr. Pressler	Mr. Inouye
Mr. Stevens	Mr. Riegle
Mr. Kasten	Mr. Gore
Mr. Trible	
Mr. Long	
Mr. Ford	
Mr. Exon	
Mr. Rockefeller	

[1] By proxy.

On motion to report an original bill, the Product Liability Reform Act:

YEAS—10	NAYS—7
Mr. Danforth	Mr. Packwood [1]
Mr. Goldwater [1]	Mr. Gorton
Mrs. Kassebaum	Mr. Stevens
Mr. Pressler	Mr. Hollings
Mr. Kasten [1]	Mr. Inouye
Mr. Trible	Mr. Riegle
Mr. Long [1]	Mr. Gore
Mr. Ford	
Mr. Exon	
Mr. Rockefeller	

[1] By proxy.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

FOOTNOTES

[1] The excessive costs of the tort system have been well documented in the past by committee witnesses and legal scholars. See, e.g., *Product Liability Reform: Hearing on S. 2631 before the Subcommittee on the Consumer, of the Senate Committee on Commerce, Science, and Transportation*, 97th Cong., 2nd sess., 20 (1982) (Serial No. 97-109) (testimony of Professor James A. Henderson); O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 Minn. L. Rev. 501, 503-512 (1976); see also, Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478, 1536, n. 236 (1966).

[2] See generally. Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970).

[3] Testimony of James S. Kakalik, Ph.D., The Institute for Civil Justice of the Rand Corporation, before the Subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee, July 29, 1986. The same conclusion was reached in a study done by an actuarial consulting firm for members of the insurance industry. The study found that in 1984, 63 percent of the gross insured costs of the United States tort system consisted of payments to claimants. Robert W. Sturgis, "The Cost of the U.S. Tort System," Tillinghast, Nelson, and Warren, Inc. (November, 1985), 16. If this is reduced by one-third to account for plaintiffs' attorneys' fees, only 42 percent of the costs remain to compensate the injured. Dr. Kakalik, author of the Rand study, explained in his testimony that Sturgis' estimate of transaction costs "is higher than ours because it includes the cost of insurance premiums that cover claims, lawsuits, and the operation of the insurance system. We only report on compensation and costs directly associated with tort lawsuits."

[4] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results, 11 (1977).

[5] Andrew Schotter and Janusz Ordover, The Cost of the Tort System I, New York University, C. V. Starr Center for Applied Economics (March 1986). This study is described in James Nolan, "Liability Costs to Top US Deficit," Journal of Commerce, April 24, 1986, at 1.

[6] *Id.*

[7] Insurance Services Office, Inc., The Rising Costs of General Liability Legal Defense (May 1986).

[8] Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results, 79-80 (1977).

[9] Alliance of American Insurers Survey of Large-Loss Product Liability Claims 4 (1980).

[10] Wayne E. Green, *A Lawyer Faces Risks In Deciding to Take On Costly Damage Suits, Wall St. J., May 23, 1986, at 12.*

[11] See O'Connell, *A 'Neo No-Fault' Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 Calif. L. Rev. 898, 901-902 (1885), citing Corstevet, *The Uncompensated Accident and Its Consequences*, 3 Law & Contemp. Probs, 466, 468 (1936).

[12] Statement of Leonard Bender, M.D., on behalf of the American Congress of Rehabilitation and the American Academy of Physical Medicine and Rehabilitation, in Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings before the Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Serial No. 95-55, 594 (1977).

[13] These studies are listed and discussed in Keeton and Keeton, Torts: Cases and Materials, 2nd Ed., 784-795 (1977).

[14] Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results 49 (1977).

[15] Id. at 383.

[16] Alliance of American Insurers Survey of Large-Loss Product Liability Claims iii (August, 1980). This study almost certainly overestimates the compensation that injured victims are receiving; it only includes cases where payment exeeeded $100,000 and thus does not average in cases where the claimant had large economic loss but received less than $100,000—or nothing at all.

[17] See, e.g., U.S. Department of Transportation, Economic Consequences of Automobile Accident Injuries, v. 1, 52-53 (April, 1970).

[18] Sugarman, *Doing Away with Tort Law, 73 Calif. L. Rev. 555, 594 (1985).*

[19] Testimony at Feb. 27, 1986 hearing before Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation.

[20] See, e.g., S. Rept. 98-476, pp. 3-4; Guido Calabresi and Alvin K. Klevorick *Four Tests for Liability in Torts, 14 J. Leg. Stud. 585, 585-6 (1985).*

[21] See, e.g., Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Leg. Stud. 461, 521-7 (1985); Twerski, *A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. of Mich. J. of L. Reform 575, 580-599 (1985).*

[22] See, e.g., O'Connell, *Offers That Can't Be Refused*, 77 Nw. U. L. Rev. 589, 590-591; McCormick, *Handbook on the Law of Damages, 318 (1935).*

[23] See Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. of Mich. J. of L. Reform 575, 612 (1985)

[24] See, e.g., Speech to the American Law Institute by Chief Justice of the United States Warren E. Burger, May 13, 1986.

[25] Administrative Office of the United States Courts.

[26] Bureau of Justice Statistics, The Growth of Appeals: 1973-83 Trends (Dept. of Justice, 1985). See generally Thomas B. Marvell, There is a Litigation Explosion, Nat'l L. J., May 19, 1986 at 13. A recent study by the National Center for State Courts finds that tort lawsuits filed in selected states from 1978 to 1984 increased by nine percent, as compared to an eight percent population increase during this period. This study however, does not break down cases into separate categories. Nor does it take into account the decline in cases involving automobile accidents. It

has been estimated that automobile accidents account for one half to two-thirds of all tort filings; yet, the number of automobile injuries has decreased dramatically in this period compared to population growth and no-fault auto insurance has also removed many cases from the tort system. See Willard, *Restore Balance to the Tort System*, 72 ABA Journal 37 (1986).

[27] *Sorry, Your Policy is Cancelled*, Time, March 24, 1986, 16; *The Insurance Crisis: Now Everyone is in a Risky Business*, Business Week, March 10, 1986, 88; *When Products Turn Into Liabilities*, Fortune, March 13, 1986, 22; T.R. Reid and Kathy Sawyer, *The Liability Crisis*, Washington Post, Feb. 23-25, 1986; *Sky-High Damage Suits: The Impact on consumers, business and professions*, U.S. News and World Report, Jan. 27, 1986, 35; *Liability Insurance Squeeze Spurs Pleas to Hill for Relief*, Congressional Quarterly, Jan. 25, 1986, 148; *Businesses Struggling to Adapt as Insurance Crisis Spreads*, Wall Street Journal, Jan. 21, 1986, 31; *A World Without Insurance?* Forbes, July 15, 1985, 40; *Naked Came the Insurance Buyer*, Fortune, June 10, 1985, 67.

[28] See, e.g., Availability and Affordability Problems in Liability Insurance: Hearing before the Subcommittee on Business Trade, and Tourism of the Senate Committee on Commerce, Science and Transportation, 99th Cong. 1st sess., Serial No. 99-567 (1985); Availability and Affordability of Liability Insurance: Hearing before the Senate Committee on Commerce, Science and Transportation, 99th Cong., 2nd sess., Serial No. 99-633 (1986).

[29] State of New York Advisory Commission on Liability Insurance, Insuring our Future 37-8 (April, 1986).

[30] Id. at 78.

[31] See, e.g., id.; also Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February, 1986); The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations (May, 1986); testimony of Albert J. Beer, vice president, Tillinghast, Nelson and Warren, Inc., in Availability and Affordability of Liability Insurance: Hearing before the Senate Committee on Commerce, Science and Transportation, 99th Cong., 2nd sess., Serial No. 99-633, 15 (1986).

[32] See generally Russ Banham, *Insurance Crisis Held Slowing New Product Development Pace*, Journal of Commerce, Apr. 30, 1986, at 16A.

[33] Statement of Randolph J. Stayin on behalf of the American Textile Machinery Association, Product Liability Act: Hearing before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, 99th Cong., 1st Sess., Rept. No. 99-84, 173 (1985).

[34] Michael Brody, *When Products Turn Into Liabilities*, Fortune, March 3, 1986, at 22.

[35] Id.

[36] *A Comeback for Whooping Cough*, Time, June 30, 1986, 78.

[37] See Philip M. Boffey, *Vaccine Liability Threatens Supplies*, N.Y. Times June 26, 1984, at C-1; and Stephen Engelberg, *Maker of Vaccine Quits the Market*, N.Y. Times Dec. 12, 1984, at A-21.

[38] Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management by the Courts*, 85 Columb. L. Rev. 277, 289 (1985).

[39] Testimony of Rep. Dan Glickman before the Aviation Subcommittee of the Senate Commerce Committee, June 18, 1986.

[40] See Mellot, *Product Liability and International Trade*, Product Liability and Tort Law Reform, National Legal Center for the Public Interest, A-128 (April 21, 1982).

[41] Id.

[42] See Orban, *Product Liability and International Trade and Policies*, Product Liability and Tort Law Reform, National Legal Center for the Public Interest, 144 (April 21, 1982).

[43] See letter from James A. Gray, President, National Machine Tool Builders Ass'n, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office Of Management and Budget (June 14, 1982).

[44] 43 Fed. Reg. 14612 (April 6, 1978).

[45] 44 Fed. Reg. 62714 (October 31, 1979).

[46] See generally James Barron, *40 Legislatures Act to Readjust Liability Rules*, New York Times, July 14, 1986 at A1.

[47] It has been estimated that 30.5 percent of manufactured goods are consumed in the manufacturing state. See, 1977 Census of Transportation, Commodity Transportation Survey, Summary, U.S. Dept. of Commerce, Bureau of the Census, 1-77 (1981); American Bar Assoc. Section of Corporation, Banking and Business Law, Report to the House of Delegates, Attachment B (1982). See generally Statement of Randolph J. Stayin on behalf of the American Textile Machinery Association, Product Liability Act: Hearing before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, 99th Cong., 1st Sess., Rept. No. 99-84, 170 (1985).

[48] Several State governors have recognized this in vetoing proposed product liability legislation. See, e.g., Schwartz and Bares, *Federal Reform of Product Liability Law: A Solution That Will Work*, 13 Cap. U. L. Rev. 351, 355 (1984).

[49] New York State Governor's Advisory Commission on Liability Insurance, Insuring Our Future, Vol. II, 113 (July 1, 1986).

[50] U.S. Const., Art. I, sec. 8, cl. 3.

[51] E.g., Public Utility Holding Company Act of 1935, 15 U.S.C. sec. 79 et. seq. (activities involved "not susceptible of effective control by any State"); United States Cotton Standards Act, 7 U.S.C. sec. 51 et seq. (uniform national classifications necessary to protect and promote commerce); Cigarette Labeling and Advertising Act, 15 U.S.C. sec. 1331 et. seq. (national standards essential in order that "commerce and the national economy . . . not [be] impeded by diverse, nonuniform regulations"); Federal Employers' Liability Act, 45 U.S.C. 51 et seq.

[52] U.S. Const., Art. VI, cl. 2.

[53] E.g., Final Report of the Task Force on Product Liability, 1 vol. (May 1977); Legal Study, 7 vols. (March 1977); Insurance Study, 1 vol. (March 1977); Industry Study, 2 vols. (April 1977).
[54] Final Report of the Task Force on Product Liability at I-26 (May 1977).
[55] Options Paper on Product Liability, 43 Fed. Reg. 14612, 14624 (April 6, 1978).
[56] Pub. L. No. 97-45 (15 U.S.C. 3901 et seq.).
[57] See S. Rept. No. 99-294.
[58] 132 Cong. Rec. S9249.
[59] 132 Cong. Rec. S5106.
[60] Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February, 1986).
[61] 132.Cong. Rec. S5874.
[62] 132 Cong. Rec. S6232.
[63] See section 103(c)(2) of the bill.
[64] The bill does not alter, modify, change, or preempt State laws governing who may be a "claimant." For example, state statutes stating who may bring a wrongful death or survival action are not affected by the bill. Such persons, if authorized by State law to bring the action, are "claimants" under the bill.
[65] See *Hobson v. Eaton*, 399 F.2d 781 (6th Cir. 1968), cert. denied, 394 U.S. 928 (1969). See also 30 Am.Jur.2d Evidence Sec. 1167 (1967).
[66] See, e.g., *Wickard v. Filburn* 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971).
[67] "Net economic loss" is defined in section 102(a)(11).
[68] See sections 201(d)(3) and 204(c).
[69] See, e.g., O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U of Ill. L. Rev. 333, 343; Riordan, *Adding Insult to Injury*, March 1984 Washington Monthly 13, 15.
[70] See Larson, *The Law of Workmen's Compensation*, sec. 57.14(j), 10-60 to 10-61 (1981).
[71] See, e.g., *Herb v. Hallowell*, 304 Pa. 128, 133, 154 Atl. 582, 584 (1931).
[72] *New York Central R.R. Co. v. White*, 243 U.S. 188, 203 (1916).
[73] See data cited, *supra, pp.*
[74] Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law* 80-81 (1985).
[75] Clarence Morris, *Liability for Pain and Suffering*, 59 Columb. L. Rev. 476, 477 (1959).
[76] In the expedited settlement system, the attorney's fees incurred in preparing a claim are a compensable element of the claimant's net economic loss. See sec. 102(11)(E).
[77] McCormick, Handbook on the Law of Damages 318 (1935).
[78] Restatement (Second) of Torts, Sec. 283, comment b (1965).
[79] *The Baltimore Football Club, Inc. v. Lockheed Corp., 525 F.Supp. 1206 (N.D.* GA. 1981); *Industrial Uniform Rental Co. v. Int'l Harvester Co.*, 463 A.2d 1085 (Pa. Super. 1983); *Noorman Mfg. Co.* v. *National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443 (1982; *Superwood Corp.* v. *Siempelkamp corp.*, 311 N.W. 2d 159 (Minn. 1981).
[80] 63 Cal. 2d 9, 403 Pacific 2d 145, 45 Cal. Rptr. 17 (1965).
[81] ——— S.Ct.———, 54 U.S.L.W. 4649 (June 16, 1986).
[82] See Note, *Economic Loss in Product Liability Jurisprudence*, 66 Colum. L. Rev. 917 (1966).
[83] "Person" is defined in section 102(a)(13).
[84] "Product" is defined in section 102(a)(15).
[85] E.g., *Mechanical Rubber & Supply Co. v. Caterpillar Tractor Co.*, 80 Ill. App. 3d 262, 399 N.E. 2d 722 (1980). See also *New Mexico v. Gatham-Matotan Architects and Planners, Inc.*, 98 N.M. 740, 653 P. 2d 166 (1982).
[86] "Product seller" is defined in section 102(a)(16).
[87] See, e.g., *Green v. City of Los Angeles*, 40 Cal. App. 3d 819, 115 Cal. Rptr. 685 (1974) (seller of crane liable for harm caused by defects in the crane created by the seller's modifications; given the modifications made by the seller, it was "tantamount to a manufacturer").
[88] Restatement (Second) of Torts Section 400 (1965). E.g., *Smith v. Regina Mfg. Corp.*, 396 F. 2d 826 (4th Cir. 1968); *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973); *Moody v. Sears, Roebuck & Co.*, 324 F. Supp. 844 (S.D. Ga. 1971).
[89] "Collateral benefits" are defined in section 102(a)(3).
[90] See 30 Am. Jur. 2d Evidence Section 1164 (1967); Cleary, McCormick on Evidence section 339 (3d ed. 1984).
[91] Human tissue, blood, and organs are generally used pursuant to medical treatment. Claims for harms caused by these substances are, in the view of most courts, claims for negligently performed services. In the past, however, a few states have held that the law of product liability is applicable to harms caused by such substances, and this act does not prevent them from doing so. See, e.g., *Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E. 2d 897 (Sup. Ct. 1970) (overturned by Ill. Ann. Stat. Ch. 111 1/2, sections 2 and 3.) In those states which do not recognize such substances as products, the law with respect to such harms will not be changed. In states that do extent such recognition, suits for harm caused by such substances, which are brought under a theory of product liability would be governed by the provisions of this bill. See, generally, *Prod. Liab. Rep.* (CCH) Paragraph 1187.
[92] E.g. Restatement (Second) of Torts Sections 353, 385 (1965) (providing standards of care for builders, contractors, and sellers of real estate).
[93] Sec., e.g., Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Bichler v. Willing, 58 App. Div. 2d 331, 397 N.Y.S.2d 57 (1977); Barbee v. Rogers, 425 S.W. 2d 342 (Tex. 1968); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A. 2d 539 (1967), *aff'd*, 100 N.J. Super. 223, 241 A.2d 637 (1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969).
[94] E.g., *Nath v. National Equipment Leasing Corp.*, 497 Pa. 126, 439 A.2d 633, 636 (1981) ("It would be novel indeed to suggest that financing agencies should be responsible for detecting defects in the products financed. Such a result would have catastrophic impact upon commerce. . . . [The lessor's] participation in the chain of events was tangential. . . .").

[95] See, for example, 42 U.S.C. 1395y(b)(1) [Medicare] and 42 U.S.C. 1396a(a)(25) [Medicaid].

[96] Schmidt & Derman, *The Constitutionality of Federal Products Liability/Toxic Tort Legislation*, 6 J. Prod. Liab. 171, 184 (1983).

[97] The effect of the bill on State law is the same as the effect, for example, of the Federal Employers' Liability Act on the law applied in actions involving injuries to railroad employees. 45 U.S.C. Sections 51 et. seq. (1982). E.g., Urie v. Thompson, 337 U.S.C. 163, 174 (1949); Brown v. Cedar Rapids and Iowa City Ry. Co., 650 F. 2d 159, 161 (8th Cir. 1981); Isgett v. Seaboard Coast Line R. Co., 332 F. Supp. 1127 (D.S.C. 1971).

[98] U.S. Const. art. I, Section 8, cl. 3.

[99] The Commerce Clause power extends to interstate and intrastate activities which affect interstate commerce. See e.g., Federal energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (discussion of scope of Commerce Clause); Fry v. United States, 421 U.S. 542 (1976); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

[100] U.S. Const. art. VI, cl. 2.

[101] E.g., longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. Sections 901 et seq. (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. Section 2210 (limiting liability for nuclear power plant accidents); Federal Employers's Liability Act, 45 U.S.C. Sections 51 et seq. (governing the liability of interstate railway carriers to their employees and altering State tort law on availaible defenses).

[102] Dice v. Akron, Canton & Youngstown R.R. Co, 342 U.S. 359 (1952) (Federal Employers Liability Act). In addition, when there is a variance between State and Federal law, "incompatible doctrines of local law must give way to principles of federal . . . law". Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co., 369 U.S. 95, 102 (1962) National Labor Relations Act).

[103] For example, the provisions of the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 et seq. are not affected by the act.

[104] This Act provides: " '[E]nvironment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Managaement Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdication of the United States."

[105] Section 1332 of title 28, United States Code, establishes Federal district court jurisdiction in cases involving diversity of citizenship.

[106] The preliminary findings of an Alliance of American Insurers study of large product liability claims closed in 1985 show that only 11.2 percent of the claims were tried to verdict. About 70.5 percent of the claimants filed a lawsuit but settled the claim before trial. Another 13.8 percent settled during the trial but before verdict. A recent New York University study found, however, that "[t]he cost of that litigation that does take place . . . represents over 95% of the administratie costs of the system. Hence, at least in terms of costs, the system is litigation driven." Testimony of Professor Andrew Schotter before the Subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee, July 29, 1986 (citing Schotter and Ordover, The Cost of the Tort System (March, 1986).

[107] "Net economic loss" is defined in section 102(a)(11).

[108] "Dignitary loss" is defined in section 102(a)(6).

[109] Such alternative dispute resolution mechanisms habe proliferated since the 1960's as a response to the backlog in the courts and the need for expeditious and equibable alternatives to litigation. In 1980, the Dispute Resolution Act (P.L. 96-190) was enacted to assist the states in providing access to dispute resolution mechanisms that are effective, fair, inexpensive, and expenditious. See, generally,. Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 Harv, L. Rev. 668 (1986); Levin & Golash, Alterntaive Disput Resolution in Federal District Courts, 37 U. of Florida L. Rev. 1 (1985); Judicial Conference, Federal Circuit, 100 F.R.D. 499, 512-531 (1983).

[110] Letter of Prof. Calabresi to Senator John C. Danforth, May 20 1986.

[111] The United States Supreme Court has held that limitations on liability are constitutional. See Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 88 n. 32 (1978) (upholding) Price-Anderson Act's cap on the liability of nuclear power plant operators); Fein v. Permanente Medical Group, — U.S. —, 106 S. Ct. 214, 88 L. Ed. 2d 215 (1985) (holding that California's $250,000 cap on medical malpractice recoveries for non-economic damages raised "no substantial federal question".)

[112] O'Connell *Offers That Can't Be Refused*, 77 NW. U. L. Rev. 589, 604-5 (1982).

[113] See pp. 4-13, *supra*.

[114] See Harper & James, *The Law of Torts*, pp. 1345-46 (1956); O'Connell, *A Proposal to Abolish Contributory and Comparative Fault With Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 Ill. L. L.F. 591. See also Restatement (Second) of Torts, sec. 402A (1965). (A seller of a defective product which causes harm to person or property is the liable "although the seller has exercised all possible care in the preparation and sale of his products.")

[115] See discussion, pp. 48-53, *supra*.

[116] Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results, page 79 (1977).

[117] These states are Alabama (Ala. Code sec. 6-5-486); Alaska (A.S. 09.55.548 (medical malpractice only)); Arkansas (Ark. Stat. Ann. sec. 34.2619); California (Cal. Civ. Proc. Code sec. 667.7); Delaware (Del. Code Ann. Tit. 18 sec. 6864); Florida (Fla. Stat. sec. 768.57 (awards over $500,000 against health care providers)); Illinois (Public Act 84-7, Ill. Rev. Stat., Ch. 110, Par. 2-611.1); Indiana (permitted by custom and practice, not statutory or case law); Kansas (Kan. Stat. Ann. sec. 60-2609); Louisiana (La. Rev. Stats. 13:5114 (Act No. 45) 450); Minnesota (Minn. Stat. 3.736 et. seq.); Montana (common law); New York (Civil Practice Law & Rules 50-A) Rhode

Island (R.I. Gen. Laws sec. 28-33-25 (workers' compensation only)); South Carolina (custom and practice); Tennessee (Tenn. Code Ann. secs. 7-51-202 and 9-8-307). See generally Trolin, Controlling Liability Insurance Costs: State Actions and Future Initiatives in the Area of Civil Justice Reform, National Conference of State Legislatures (January, 1986).

[118] *Fetter v. Beal*, King's Bench, 1 Raymond's Rep. 339, 91 Eng. Rep. 11 (1699); aff'd sub. nom. *Ferrer v. Beale*, King's Bench, 1 Raymond's Rep. 692, 91 Eng. Rep. 1122 (1702).

[119] Harper and James, *The Law of Torts* (1956), 1304.

[120] Thus, under the Michigan no-fault automobile statute, which requires insurers to pay accident victims' medical bills as they arise, with no upper limit, total losses generally have been consistent and predictable. See Insurance Services Office, "Private Passenger Automobile Fast Track Data for Fourth Quarter 1985," Actuarial Services AS-PP-86-3, March 31, 1986.

[121] See generally Note, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards, 64 Iowa L. Rev. 138 (1978).*

[122] John Fleming, *Damages: Capital or Rent?*, 19 U. of Toronto L.J. 295, 320 (1969).

[123] Section 202(a) of the bill provides that, when a title II offer of settlement has been accepted, the court in which the claimant's product liability action has been brought shall retain jurisdiction "for the purpose of resolving disputes concerning the extent of the claimant's net economic loss and for other purposes consistent with this title."

[124] (The Pennsylvania statute has since been repealed.) Michigan, New Jersey, and Pennsylvania have passed no-fault statutes providing unlimited medical benefits with time limitations on recovery. Michigan requires that any claim for medical benefits be made "within 1 year after the most recent allowable expense." Mich. Comp. Laws Ann., sec. 500.3145. New Jersey requires that "an action for further benefits may be commenced not later than 2 years after the last payment of benefits." N.J. Stat. Ann. sec. 39:6A-13.1. Pennsylvania provided that "an action for further benefits shall be commenced within four years from the date of the last payment." Pa. Comp. Stat. Ann. Title 75, sec. 1721. See also Uniform Motor Vehicle Accident Reparations Act, National Conference of Commissioners on Uniform State Laws, sec. 28 (1972).

[125] "Product seller" is defined in section 102(a)(16).

[126] E.g., Vandermark v. Ford Motor Co., Cal. 2d 256, 391 P. 2d 168, 37 Cal. Rptr. 896 (1964).

[127] Indemnity "rests upon the equitable principle of a right to restitution." Where "the wrongful act of one result in liability being imposed on another, such other person may have indemnity from the person actually guilty of the wrong." Minster Machine Co. v. Diamond Stamping Co., 72 Mich. App. 58, 248 N.W.2d 676, 678 (1976) (claimed by manufacturers against an employer). See also 41 Am. Jur. 2d Indemnity Sections 20, 25 (1968).

[128] See e.g., Hales v. Monroe, 544 F.2d 331 (8th Cir. 1976); Litton Systems Inc. v. Shaw's Sales & Services, Ltd., 119 Ariz. 10, 579 P.2d 48 (1978); Fairburn v. Montgomery Ward & Co., 349 So.2d 1280 (La. App. 1977); Anderson v. Somberg, 158 N.J. Super. 384, 386 A.2d 413 (1978).

[129] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results, 35 (1977).

[130] E.g., Kelly v. Hanscom Bros., Inc., 231 Pa. Super. 357, 331 A.2d 737, 740 (1974). ("It is not unusual for liability to move transactionally up the chain of distribution until the manufacturer ultimately pays . . .".)

[131] Piedmont Equipment Co. v. Eberhard Mfg. Co., 665 P.2d 256, 259 (Nev. 1983) (holding that a product seller, absolved of liability in a products case, may seek indemnification from the responsible manufacturer for his legal costs).

[132] See, e.g., Sam Shainberg Co. v. Barlow, 258 So.2d 242, 246 (Miss. 1972) ("[I]t would not be reasonable, logical or practical to place on every retail merchant the absolute duty of inspecting for latent defects in every article. . . that the retailer might offer for sale. Such a rule of law would make each retail merchant an insurer or guarantor of every one of the thousands of items he handles merely as a sales conduit.")

[133] E.g., Colo. Rev. Stat. Section 13-21-402 (Supp. 1984), Idaho Code Section 6-1407 (Supp. 1985); N.C. Gen. Stat. Section 99B-2 (1985).

[134] See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896 (1964) ("the retailer may be the only member of that enterprise reasonably available to the injured plaintiff").

[135] See Ky. Rev. Stat. Section 411.340 (Supp. 1984); Tenn. Code Section 29-28-106 (Supp. 1985). See also Brady v. Steyr-Daimler-Puch, A.G., 429 So. 2d 1348 (Fla. App. 1983) (summary judgment for distributor who shipped product in sealed container to dealer).

[136] See e.g., Kirby v. Rouselle Corp., 108 Misc. 2d 291, 437 N.Y.S.2d 512 (1981); Canifax v. Hercules Powder Co., 237 Cal. Appl. 2d 44, 46 Cal. Rptr. 552 (1965).

[137] See Restatement (Second) to Torts Section 908 (1) (1965).

[138] Punitive damage are not permitted in Louisiana, e.g., Ricard v. State, 390 So. 2d 882 (La. 1980); Massachusetts, e.g., Caperci v. Huntoon, 397 F.2d 799 (1st Cir.) (dictum), cert. denied, 393 U.S. 940 (1968); Nebraska, e.g., Prather v. Eisenmann, 200 Neb. 1, 261 N.W., 2d 766 (1978); and Washington, e.g, Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981). Other States put some limits on the allowance of punitive damages, for example, in breach of contract or wrongful death actions.

[139] See J. Chiardi & Kircher, "Punitive Damages—Law and Practice," Section 5.01 at 8 (1981), Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1,38 (1982); Owen, "Problems In Assessing Punitive Damages Against Manufacturers of Defective Product," 49 U. Chi. L. Rev. 1, 21 (1982).

[140] Some States require proof by clear and convincing evidence, a higher standard of proof. See Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W. 2d 437, 457 (1980); Sabich v. Outboard Marine Corp., 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976); Minn., Stat. Ann. Section 549.20 (Supp. 1986); Or., Rev. Stat. Section 30.925 (1) (1981). See also Colo. Rev. Stat. Sections 13-25-127 (2) (1973) (proof beyond reasonable doubt).

[141] The Alliance of American Insurers' continuing series of studies of large (over $100,000) product liability claims found that in 1975, punitive damages were sought in only 5% of product liability cases; by 1979, they were being sought in 18% of cases. AAI Survey of Large-Loss Product Liability Claims (1980) at iii. A recent Rand Institute for Civil Justice study found that the average punitive damage award in personal injury cases in Cook County, Illinois increased from $40,000 to $1,152,174 in 1980-84. See Peterson, Punitive Damages: Preliminary Empirical Findings, Rand Corp. N-2342-ICJ at 25 (1985), cited in Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability at 39-43 (1986). (These figures were adjusted for inflation and are stated in 1984 dollars.) *See generally* Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133 (1982); Owen, *Problems in Assessing Punitive Damages Against Manufacturer of Defective Products*, 49 U. Chi. L. Rev. 1 (1982).

[142] *Twerski, A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. Mich. J. of L. Ref. 575, 612 (1985).

[143] Compliance with a federal, state or local governmental safety standard is not generally a defense of any sort in a product liability action; however, four state statutes do provide for consideration of compliance with government standards as a defense in product liability actions. In Utah, Colorado, Tennessee, and North Dakota, such compliance establishes a rebuttable presumption as to the safety of the product. In New Hampshire, such compliance is one element of an affirmative defense, See Utah Code. Ann. $78-15-6(3); Colo; Rev. Stat. $13-21-403(1) (b); Tenn. Code. Ann. $29-28-104; N.D. Century Code $28-01-05(3); N.H. Rev. Stat. Ann. Ch. 507-D:4.

[144] See, e.g., Huber, "Safety and the Second Best: The Hazards of Public Risk Management in the Courts," 85 Col. L. Rev. 277 (1985); *The Bhopalization of U.S. Tort Law*, Issues in Science and Technology, Fall 1985, pp.

[145] Johnson v. American Cyanamid Co., Eighteenth Judicial District for the District of Sedgwick County, Kansas, June 1984, reversed, Kan. Sup. Ct., No. 57,369. The Kansas Supreme Court reversed by a narrow 4-3 margin, and did not reach the government standards issue.

[146] Edmund W. Kitch, *Vaccines and Product Liability: A Case of Contagious Litigation, Regulation, May/June 1985, at 15.*

[147] See W.P. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts 214 (5th ed. 1984); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1368-69 (1976); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 20-28 (1982); Owen, Civil Punishment and the Public Good, 56 So. Cal. L. Rev. 103, 116 (1982) ("Punishment becomes appropriate [only] at an 'extreme' distance from the norm, where the conduct has become clearly flagrant").

[148] Owen, supra note , 49 U. Chi. L. Rev. at 27-28. See Laney v. Coleman Co., 758 F.2d 1299 (8th Cir. 1985) (reversing punitive damages award); Roth v. Black & Decker, U.S., Inc., 737 F.2d 779 (8th Cir. 1984) (same). See also American Motors Corp v. Ellis, 403 So.2d 459, 469 (Fla. App. 1981) (Cowart, J., dissenting in part) ("Even assuming that the AMC engineers were wrong in these determinations, at most that could only amount to negligence, not the malicious refusal to implement a 'safer' design required to support an award of punitive damages."); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 598, 602 (Tex App. 1982) (Gonzalez, J., dissenting) ("there is no evidence that Ford was consciously indifferent to appellees' rights"); American Cyanamid Co. v. Roy, 466 So.2d 1079, 1085 (Fla. App. 1984) (Amstead, C.J., dissenting in part on rehearing) ("The facts simply do not reflect the kind of flagrant misconduct that would justify" punitive damages).

[149] Owen, supra note , 49 U. Chi. L. Rev. at 38.

[150] Id. at 16, 24.

[151] See Roth v. Black & Decker, U.S., Inc., 737 F.2d 779 (8th Cir. 1984) ("the evidence must show that the defendant was aware that its acts were wrongful in some way"); Prosser and Keeton on Torts, supra note 1, at 214 n.62 ("a consciousness that the conduct is unlawful or morally wrong"); R. Epstein, Modern Products Liability Law 181 ("defendant knew that the conduct was wrongful").

[152] "Clear and convincing evidence" is defined in section 102(a)(2). "Preponderance of the evidence" is defined in section 102(a)(14).

[153] See Owen, "Crashworthiness Litigation and Punitive Damages," 4 J. Prod. Liab. 221, 226 (1981).

[154] Uniform Product Liability Act Section 120, 44 Fed. Reg. 62714, 62748 (1979). See also note , supra.

[155] Wheeler, "The Constitutional Case for Reforming Punitive Damage Procedures," 69 Va. L. Rev. 269, 298 (1983).

[156] See Ala. Code § 6-5-410 (1975).

[157] Cf., Federal Tort Claims Act, 28 U.S.C. Section 2674 (1982).

[158] This provision does not apply to medical devices that were never subject to pre-market approval by the FDA, such as the intrauterine device known as the Dalkon Shield, which was taken off the market before FDA pre-market regulation of medical devices began in 1976. See Report on H.R. 11124, Medical Devices Amendments of 1976, H. Rep. No. 94-853, 94th Cong., 2nd Sess. 8 (1976).

[159] 21 U.S.C. 360b.

[160] 21 U.S.C. 360e.

[161] Testimony of Dr. Charles Leighton on behalf of the Pharmaceutical Manufacturers Association, Product Liability Act Amendments: Hearings before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, 99th Cong. 1st. Sess., Serial No. 99-177 at 21 (1985).

[162] Under present law, different statutes of limitations apply in product liability actions depending upon the particular theory of the case. For example, a statute of limitations applicable in tort may be the rule in an action based on negligence while a statute of limitations applicable

in contract may be the rule in an action based on breach of warranty. The act will establish one statute of limitations for all product liability actions.

[163] See Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, rhg. denied, 325 U.S. 896 (1945).

[164] See, e.g., *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979); *Wojcik v. Almase*, 451 N.E. 2d 336 (Ind. App. 1983); *New Mexico Electric Service Co. v. Montanez*, 89 N.M. 278 (551 P. 2d 634 (1976)); *Lange v. Bucyrus-Errie Co.*, 707 F. 2d 94 (4th Cir. 1983).

[165] See, e.g., Conn, Gen. Stat. $52-577(a)(1983); Witherall v. Weimer, 52 Ill. 2d. 146, 421 N.E. 2d 869 (1985); Hansen v. A.H. Robins, Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983); Hines v. Tenneco Chemicals, Inc., 546 F. Supp. 1229 (S.D. Tex 1982).

[166] As one judge said, this follows the logic of "topsy-turvy land" where one can "be divorced before [he] ever . . . marr[ies], or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad." Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank J. dissenting).

[167] See e.g., Williams v. Borden, Inc. 637 F.2d 731, 734 (10th Cir. 1980); Nelson v. A.H. Robins, Co., 515 F. Supp. 623 (N.D. Cal. 1981); Lundy v. Union Carbide Corp. 695 F.2d 394 (9th Cir. 1982); Fidler v. Eastman Kodak Co., 555 F. Supp. 87 (D. Mass. 1982); Mack v. A.H. Robins Co., Inc., 573 F. Supp. 149 (D. Ariz. 1983); Olsen v. Bell Telephone Laboratories, Inc., 388 Mass. 171, 445 N.E. 2d 609 (1983); Elmore v. Owens-Illinois, Inc., 673 S.W. 2d 434 (Mo. Ct. App. 1983); Sahlie v. Johns-Manville Sales Corp., 99 Wash. 2d 550, 663 P. 2d 473 (1983).

[168] See Martin, "A Statute of Repose for Product Liability Claims," 50 Fordham L. Rev. 745, 746 (1982).

[169] Id. at 747-748 (footnotes omitted).

[170] "Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results," 230, 414 (1977).

[171] Statement of M. Dana Baldwin, II, on behalf of Wood Machinery Manufacturers of America, Hearing Before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, May 20, 1986.

[172] See, e.g., Ill. Stat. Ann. Ch. 110 [PARAGRAPH SYMBOL] 13-214(b) (1984) (claim is barred if harm occurred more than 12 years after the first sale, lease, or delivery, or ten years after the sale to the initial user, whichever is shorter); Or. Rev. Stat. Ann. $30.905(1) (Supp. 1985) (eight-year statute of repose).

[173] See, e.g. Ky Rev. Stat. $411,310 (Supp. 1984) (presumption that product is not defective if the harm was caused five years after the sale of the product to the first consumer or eight years after the product was manufactured. This persumption can be rebutted by a preponderance of the evidence to the contrary.)

[174] See, e.g., Kans. Stat. Ann. $60-3303 (1983) (after ten years, a presumption arises that the harm was caused after the useful safe life had expired, rebuttable by clear and convincing evidence); Conn. Gen. Stat. $52-577(a)(c) (Supp. 1984) (statute of repose does not apply if plaintiff proves that harm occurred during the useful safe life of the product or if product is warranted for a longer period).

[175] There is evidence that older claims and the fear of older claims have a "disproportionate effect" when insurance rates are established. Martin, supra note —, at 756, citing Interagency Task Force on Product Liability, U.S. Department of Commerce, Final Report of the Insurance Study by McKinsey & Co. 4-92 (1977).

[176] As defined in section 304(c)(2), "toxic harm" means harm which is functional impairment, illness, or death of a human being resulting from exposure to an object, substance, mixture, raw material or physical agent of particular chemical composition. Recovery for such harm is not impeded by the 25-year statute of repose for capital goods.

[177] Martin, supra note —, at 757.

[178] Chelius, Workplace Safety and Health: The Role of Workers' Compensation 20 (1977).

[179] E.G., Ill. Stat. Ann. Ch. 110, [PARAGRAPH SYMBOL] 13-213(b) (1984); Tenn. Code. Ann. $29-28-103 (1980). A few State statutes of repose have been held to violate particular State constitutional provisions that guarantee redress in court for any injury. E.g., Lankford v. Sullivan, Long & Hagerty, 416 so. 2d 996 (Ala. 1982). None have been declared unconstitutional under the United States constitution.

[180] E.g., Interagency Task Force on Product Liability, U.S. Department of Commerce, Final Report VII-28 to 29 (1977) (recommending a 10-year period for workplace goods).

[181] Section 105 provides that if any provision of this act would shorten the period during which a manufacturer or product seller would otherwise be subject to liability, the claimant may, notwithstanding the otherwise applicable time period, bring an action within one year after the effectie date of the act. This means that if a person is harmed by a 26-year-old capital good, and the enactment of section 304 would immediately bar his claim while applicable State law would not bar the claim, the person has one year from the effective date of the act within which to file his claim.

[182] Johnson v. Star Machinery Co., 530 P.2d 53, 56 (Or. 1974).

[183] See Uniform Product Liability Act, sec. 110(B)(2)(C), 44 Fed. Reg. 62714, 62732-33 (1979).

[184] See, e.g., *Daniell v. Ford Motor Co.*, 581 F.Supp. 728 (D.N.M. 1984) (woman locked herself in trunk of car in suicide attempt, which failed, and then sued automobile manufacturer for failure to warn that trunk could not be opened from inside).

[185] Fed. R. Civ. 11 (1983).

[186] Prior to the 1983 amendment to Rule 11, courts were reluctant to impose sanctions on attorneys who violated the rule. The 1983 amendment incorporated into the language of the rule a directive to the court to impose such sanctions. *See Notes of Advisory Committee on Rules to 1983 Amendment; See also Burbank, "Sanctions in the Proposed Amendment to the Federal Rules of Civil Procedure: Some questions About Power," 11 Hofstra L. Rev. 997 (1983).*

[187] See Albright v. Upjohn Co., No. 85-5256 (6th Cir. April 24, 1986); *Glaser v. Cincinnati Milacron, Inc., 2 Fed. R. Serv. 3rd 1267 (W.D. Pa. 1983) (in action for wrongful death of plaintiff's*

husband, plaintiff sued 101 manufacturers of Benzene used during the course of plaintiff's husband's employment, and 86 of the defendants were dismissed by plaintiff voluntarily after learning that they had not manufactured or supplied the products. Plaintiff's counsel had not even inquired of the husband's employer prior to filing suit whether records of chemical purchases were available for inspection.

[188] *See Weisman v. Rivlin, 1 Fed. R. Serv. 3rd 1527 (D.D.C. 1984).*

[189] *Fed. R. Civ. 37 (as amended 1980).*

[190] *See, e.g., Toxic Substances Control Act, 15 U.S.C. 2607(c)* (1982) (manufacturers and distributors of chemical substances must maintain records of "significant adverse reactions to health or the environment"); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(f) (1982) and 40 C.F.R. 169.2 (1985) (pesticide manufacturers must retain records of any tests conducted on human beings, including any health effects, and records containing research data relating to registered pesticides, all underlying raw data and interpretations or evaluations thereof).

[191] See, e.g. 15 U.S.C. 2614, 2615 (1982) (Toxic Substances Control Act); 7 U.S.C. 1361 (1982) (Federal Insecticide, Fungicide, and Rodenticide Act).

[192] 15 U.S.C. 2051 et seq. (1982).

[193] 16 C.F.R. 1209.38 (1985).

[194] 16 C.F.R. 1204.17 (1985).

[195] 16 C.F.R. 1205.34 (1985).

[196] 15 U.S.C. 2069, 2070 (1982).

[197] 2 Wigmore on Evidence 291 at 222 n.1 (Chadbourn rev. 1979).

[198] Id at 228.

[199] See, e.g., Interstate Circuit v. United States, 306 U.S. 208 (1938); Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985); Knightsbridge Marketing Services, Inc. v. Promociones Y Proyectos, 728 F.2d 572 (1st Cir. 1984); Gumbs v. International Harvester, Inc., 718 F.2d 88 (3rd Cir. 1983).

[200] 692 F.2d at 218.

[201] See McCormick on Evidence 273, at 661 (1982) ("the real underpinning of the rule of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof.")

[202] See S.C. Johnson & Son v. Louisville & Nashville R.R., 695 F.2d 253, 258 (7th Cir. 1982) ("[t]he crucial element is not that the evidence was destroyed but rather the reason for destruction [i.e., the bad faith of the party who destroyed the evidence].").

[203] The reforms contained in this section have been advocated for many years by Professor Arthur Larson, a leading expert on workers compensation law. See testimony of Professor Larson, Hearings on S. 44 before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, 98th Cong., 1st Sess. pp. 269-270 (1983) (Serial No. 98-302).

[204] A. Larson, 2A "The Law of Workmen's Compensation" Sec. 65.10 (1982). See *Kofron* v. *Amoco Chem. Corp.*, 441 A. 2d 226 (Del. 1982).

[205] Aaron D. Twerski, *A Moderate and Restrained Product Liability Bill,* 18 Mich. J. of L. Ref. 575, 614-615 (1985).

[206] E.g., Bell v. Industrial Vangas, Inc. 30 Cal. 3d 268, 179 Cal Rptr. 30, 637 P. 2d 266 (1981); Mercer v. Uniroyal, Inc., 49 Ohio app. 2d 279, 361 N.E. 2d 492 (1970). Contra, Provo v. Bunker Hill Co., 393 F. Supp. 778, 787 (D. Idaho 1975) ("The duty of an employer to provide safe machinery . . . does not lend itself to an interpretation that such obligation is really two legal duties.")

[207] See Blankenship v. Cincinnati Milacron Chemicals, Inc., 69 Ohio St. 2d 608, 433 N.E. 2d 572 (1982) (exposure to chemicals found to be an intentional tort); Mandolidas v. Elkins Industries, 246 S.E. 2d 907 (W. Va. 1978) (willful, reckless conduct found to be an intentional tort). The Mandolidas decision was overruled in party by Code of W. Va. Section 23.4-2 (1983).

[208] E.g., Skinner v. Reed-Prentice Div., 70 Ill. 2d 1, 374 N.E. 2d 437 (1977), cert. denied, 426 U.S. 946 (1978); Dole v. Dow Chem. Co. 130 N.Y. 2d 143, 331 N.Y.S. 2d 382, 282 N.E. 2d 288 (1972).

[209] Lamberton v. Cincinnati Corp., 312 Minn. 114, 257 N.W. 679 (1977);

[210] E.g., Hammond v. Kolberg Mfg. Corp., 542 F. Supp. 662 (D. Colo. 1982); Glass v. Stahl Specialty Co, 97 Wash. 2d 880, 652 P. 2d 948, (1982); Union Carbide Corp. v. Dunn Bros. Gen. Contractors, 294 F. Supp. 704 (M.D. Tenn. 1968); Jack Morgan Constr. Co. v. Larkan, 254 Ark. 838, 496 S.W. 2d 431 (1973).

[211] Twerski, *supra* note 205, at 615.

[212] Claimants who are covered by workers' compensation statutes and are thus entitled to workers' compensation benefits should be encouraged to the the workers' compensation system.

[213] It is anticipated that in many cases the workers' compensation proceeding will be completed before the product liability action, and the amount of workers' compensation benefits will be determined before the judgment is reached in the product liability action. In the unlikely situation where the workers' compensation proceeding has not been initiated or completed, the claimant may seek a stay of the product liability action pursuant to section 307(b). If no stay is sought, the trier of fact will determine the amount of workers' compensation benefits for the purposes of this section. If upon completion of the proceeding, the workers' compensation benefits are higher or lower than this estimate, the judgment shall be revised accordingly.

[214] In a hypothetical case, a claimant is entitled to $50,000 in workers' compensation benefits and sustains total damages of $500,000. The judgment against the defendant would be $450,000, calculated as follows: $500,000 total damages less $50,000 workers' compensation benefits. The claimant still receives a net total of $500,000 in compensation.

[215] For example, if the claimant received $50,000 in workers' compensation benefits and $500,000 from the defendant manufacturer, the subrogation lien would prevent double recovery by the claimant. Instead of taking home $500,000 (or $50,000 more than his total damages), the employer recoups through subrogation the $50,000 it paid, and the employee is left with

$450,000. The workers' compensation offset established by section 307(a) will produce the same net result for the claimant, but will prevent the employer from escaping responsibility for payment of the workers' compensation benefits.

[216] Prosser and Keeton on the Law of Torts, Sections 9, 10, 11 (5th ed. 1984).

[217] See statement of Senator Larry Pressler, Hearings on S. 1999 before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation (March 11, 1986). See also Report of the Tort Policy Working Group on the Cause, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, pp. 33–34, 64–65.

[218] See, e.g., *Holtz v. Holder*, 101 Ariz. 247, 418 P. 2d 584, 586 (1966) ("[I]t is more desirable as a matter of policy, for an injured and innocent plaintiff to recover his entire damages jointly and severally from independent tortfeasors, one of whom may have to pay more than his just share, than to let two or more wrongdoers escape liability altogether, simply because the plaintiff cannot carry the impossible burden of proving the respective shares of causation. . . .")

[219] See V. Schwartz, Comparative Negligence, Ch. 16 at 251–261 (2d Ed. 1986): See generally Prosser and Keeton on Torts (5th ed. 1984), Chap. 8.

[220] Some states have adopted "pure" comparative negligence rules which provide for apportionment of responsibility and reduce the claimant's damages in proportion to his or her own fault. Other states have "modified" comparative negligence rules which allow the claimant to recover damages from the defendant unless the claimant's fault is greater than the defendant's fault or greater than the aggregate fault of all defendants. See Schwartz, *Comparative Negligence, supra*, at appendix A, (citing comparative negligence systems of general application in American jurisdictions.)

[221] See generally Speiser, Krause & Gans, *The American Law of Torts* (1983) Section 3:/.

[222] See Granelli, "The Attack on Joint and Several Liability," 71 A.B.A. L. J. 61 (1985) (citing examples of injustices resulting from application of joint and several liability.)

[223] See. e.g., Alaska S.B. 377; Wash. S. B. 4630; Schwartz, *Comparative Negligence*, supra, Section 16.4 at 258–61.

[224] This initiative, Proposition 51, was approved by California voters in a primary election on June 3, 1986. The California law took effect immediately.

[225] *Jenkins v. Pennsylvania R.R.*, 67 N.J. Law 331, 334, 51 Atl. 704,705 (1902).

[226] See Prosser and Keeton on Torts, supra, section 52 at 348–351.

[227] See Uniform Comparative Fault Act, Section 2, 12 U.L.A. 39 (Supp. 1985); V. Schwartz, Comparative Negligence, supra, section 16.5 at 263–65.

[228] See generally, James & Hazard, Civil Procedure, sections 9.11, 10.18 (3rd ed. 1985).

[229] E.g., Utah Code Ann. § 78–27–40 (1986); Wyo. Stat. Ann. § 1–1–109(d) (1986).

[230] See, e.g., Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 555 P. 2d 997. See also 28 U.S.C. 1404(a). ("For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.")

[231] See, e.g., Wilson v. Seas Shipping Co. 78 F Supp. 464,465 (E.D. Pa. 1948).

[232] See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947) ("Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue.")

[233] 330 U.S. at 508–509.

[234] 330 U.S. at 508.

[235] 454 U.S. at 255–56.

[236] 454 U.S. at 257–261.

[237] 454 U.S. at 247.

[238] 454 U.S. at 252.

[239] See In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986).

[240] 634 F. Supp. at 867.

[241] A Report on the Liability Crisis: The Need for Legislative Reform of the Tort System (May, 1986), page 55 (footnote omitted).

[242] "Clear and convincing evidence" is defined in section 102(a)(2).

[243] Fed. R. Evid. 402.

[244] See Weinstein, Weinstein's Evidence (1985) 402 [06] at 402–17.

[245] See, e.g., Fed. R. Evid. 403.

[246] Fed. R. Evid. 407.

[247] Sec. Roy v. Starr Chopper Co., Inc., 584 F.2d 1124, 1134 (1st Cir. 1978), cert. denied, 440 U.S. 916 (1979); Cann v. Ford Motor Co., 658 F.2d 54, 59 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Josephs v. Harris Corp., 677 F.2d 985, 990–91 (3d Cir. 1982); Werner v. Upjohn Co., 628 F.2d 848, 854 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., 695 F.2d 883, rhg. denied, 699 F.2d 1163 (5th Cir. 1983); Hall v. American Steamship Co., 688 F.2d 1062 (6th Cir. 1982); Oberst v. International Harvester Co., 640 F.2d 863 (7th Cir. 1980); Longnecker v. General Motors Corp., 594 F.2d 1283, 1286 (9th Cir. 1979).

[248] See, e.g. Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322, 1328 (10th Cir. 1980), cert. denied. 466 U.S. 958 (1984); Unterbeurger v. Snow Co., 630 F.2d 599 (8th Cir. 1980). See generally Henderson, "Product Liability and Admissibility of Subsequent, Remedial Measures; Resolving the Cost by Recognizing the Difference Between Negligence and Strict Tort Liability," 9 Journal of Products Liability 187 (1986).

[249] See, e.g., Grenada Steel Ind. v. Alabama Oxygen Co., supra., 695 F.2d at 88.

[250] Subsequent remedial measures may be made for a variety of reasons and, therefore, the act of improving the product is not an admission of liability. *See generally 2 J. Wigmore, Evidence 283 (Chadbourn rev. 1979);* C. McCormick, "Handbook of the Law of Evidence" 275 (2nd ed. 1972); *See also Grenada Steel Ind. v. Alabama Oxygen Co., supra*, 695 F.2d at 888 ("It seems to us, with no greater expertise than like-trained lawyers and judges, that changes in design or in manufacturing process might be made after an accident for a number of different reasons:

simply to avoid another injury, as a sort of admission of error, because a better way has been discovered, or to implement an idea or plan conceived before the accident."); *Foster* v. *Ford Motor Co.*, 621 F.2d 715, 721 (5th Cir. 1980).

[251] In actions brought in Federal court based on diversity of citizenship between the parties, pursuant to 28 U.S.C. 1332, all limitations on admissibility of relevant evidence in the Federal Rules of Evidence shall apply.

[252] Wash. S.B. No. 4630, Sec. 902 (enacted March 10, 1986). The Washington Statute specifies that "If the amount of alcohol in a person's blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10% or more by weight of alcohol in the blood, it is conclusive proof that that person was under the influence of intoxicating liquor."

[253] Wash. S.B. No. 4630, Sec. 100.

ADDITIONAL VIEWS OF MR. PRESSLER

GENERALLY

Product liability is one of the most important consumer issues of this decade. The present law in this area has led to increased product and insurance costs, and has substantially hampered product development in the United States. No country in the world is subjected to this confused state of affairs, and it has put us at a substantial competitive disadvantage in the area of world trade. Prompt, effective reform is essential.

The Commerce Committee has been struggling for over five years in an attempt to devise product liability legislation which is strong enough to provide meaningful relief to American consumers, yet sensitive enough to protect plaintiffs' rights. Much work remains, but this legislation comes close to achieving those goals. There will not doubt be attempts to delay consideration of this legislation during future stages in the legislative process. But it is imperative that we go forward with the debate, and enact strong product liability reform legislation now.

I write separately to provide a brief legislative history of the evolution of the joint and several liability provision through four days of unpublished Committee Executive Sessions, and to outline my intentions regarding floor amendments on this legislation.

SECTION 308

As the author of section 308, as reported, I worked closely with the Chairman in developing the majority views relative to that section, and concur with those views. They accurately reflect the intention behind the statutory language.

The original language I offered would have completely abrogated joint and several liability except in cases involving concerted action. After proposing several different compromise alternatives, the present language of section 308 was adopted by the Committee. Although this compromise position goes a long way toward resolving the problems surrounding this confused area of the law, it falls short of the mark. Substantially innocent third parties will still be required to shoulder the responsibility for the acts of the true wrongdoer. There will still be substantial uncertainty in assessing liability, making it difficult to predict individual exposure or set insurance rates.

It is important to understand exactly what our goal is in any attempt to deal with this complicated problem. We can never hope to achieve perfect justice in this complicated area. The central policy question that needs to be answered is, "Upon whom do we place the burden of responsibility for the wrongful act of a judgment-proof third party?" Under the present doctrine, that burden can

and often does fall on a substantially innocent defendant who has had the unfortunate luck of being named as a co-defendant with the true wrongdoer. Under pure several liability, it will fall on the plaintiff, who may be either partially responsible for the harm caused or completely innocent. This is an unpleasant question for any elected official to address, but its resolution is so important that we must.

It is my intention to offer a stronger joint and several liability amendment when this legislation is debated by the full Senate. Recognizing with frustrating clarity the limitations placed upon any reform proposal, the goal of my effort is to find the alternative that minimizes the injustice and returns some sense of equity and predictability to the legal system.

It remains to be seen what the formula for realizing this goal might be. But it is clear that we have yet to find it.

Insurability of Punitive Damages

The purpose of imposing punitive damages is to punish wrongdoers acting in "conscious, flagrant indifference" to the safety of others. However, those convered by this bill in many cases are able to insure against punitive damages. This ability allows truly "culpable" actors to escape the intended purpose of punitive damages. The "punishment" is diluted if wrongdoers are able to insure against it, and unsuspecting policyholders are forced to share in the burden.

Many states now prohibit the insurability of punitive damages. This issue received only brief attention during Committee deliberations. I believe the rule against insurability of punitive damages should be universal in its application, and plan to offer an amendment to that effect during full Senate consideration of this bill.

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ADDITIONAL VIEWS OF MR. STEVENS

The issue of product liability reform and uniformity has been before this Committee for the past four Congresses. We have made substantial progress on this legislation which encompasses a series of problems which must be resolved soon.

I have been a supporter of prior legislative efforts favorably reported from the Committee. As good as the current bill is in many respects, I did not support reporting it. My opposition is based upon the cap on non-compensatory damages in the expedited claim resolution section.

Severe injury cases require that the limit of $250,000 on non-compensatory damages be raised substantially, or waived altogether. The comments made by the distinguished Senator from Hawaii (Senator Inouye) on this subject were particularly compelling and insightful. Some individual cases might be well discharged under the alternative claim resolution structure, but there are injuries or accidents due to defective products which cause dire emotional suffering, where the Committee bill's cap would be entirely inappropriate.

I will work with the Senator from Hawaii to attempt to formulate an amendment to be offered when this legislation is considered by the full Senate. I envision either raising the level of the cap, or creating a new category of injury which would not be subject to a cap for those cases of extreme or ongoing non-compensatory damage.

In addition, this legislation does not adequately address the question of attorney's fees in class action suits or suits with relatively similar fact scenarios.

The problems with our present liability laws are real and need to be addressed. We must ensure that resolution of product liability problems doesn't leave us with a myriad of new problems to struggle with.

TED STEVENS.

ADDITIONAL VIEWS OF MR. ROCKEFELLER

I voted to report the Product Liability Reform Act and wholeheartedly support the committee's efforts to create an expedited settlement system. Such a system is a necessary component of any product liability reform bill. Promoting the efficient and prompt delivery of compensation to those who have been injured is a laudable goal, as is decreasing the transaction costs and delay for both parties involved in a lawsuit. The existing civil justice system is woefully slow, cumbersome, and costly. It repeatedly fails to meet the needs of both plaintiffs and defendants to a lawsuit.

Yet, the goal of fostering quick settlements must be pursued in a way that does not work fundamental unfairness to those seeking to recover for serious injuries. I strongly object to the $250,000 cap that the committee has placed on pain and suffering recoveries where a catastrophically injured plaintiff rejects a defendant's settlement offer. When this committee voted separately on the expedited settlement system, I opposed it because of the blatant unfairness of the $250,000 cap in cases of catastrophic injury. I continue to adhere to that view.

A $250,000 cap on pain and suffering recoveries creates more hardship than it remedies. Under the settlement system reported by the committee, as long as a defendant makes a settlement offer, a plaintiff who wins his/her case will be limited to $250,000 in pain and suffering damages. A severely injured plaintiff who in good faith has decided to pursue his/her case to trial should not be penalized for prevailing. A victim who has succeeded in convincing a jury of both a manufacturer's liability and of the severity of his or her own injury should not then find himself denied the full compensation the jury believes is his due. In a range of tragic cases, where people sufer permanent damages to their bodies or faculties, the $250,000 may be nowhere near sufficient.

I do not unequivocally oppose the imposition of caps if compelling data demonstrates the necessity for such a measure to create incentives for settlement. We should, however, be very cautious in imposing caps and thereby, limiting a plaintiff's recourse to the tort system. We must recognize that, in setting caps, we are substituting Congress's judgment for that of a jury of twelve citizens who have heard the facts of a particular case.

I have listened very closely to the debate in this committee and in my view, we sorely lack the information necessary to justify setting the cap at $250,000. The data disclosure amendment included in this bill, which I introduced with Senator Ford, will provide this kind of data in the future. At the present time, however, proponents of this cap have offered no data demonstrating any rationale for setting the cap at $250,000 or at any fixed amount for that matter. By working in an information vacuum, the proponents of

the cap only dramatize the arbitrariness of a legislative fiat that would limit recoveries, regardless of the facts of a case.

Ironically, the scant data we do have suggests that the civil justice system grossly undercompensates those people with the largest losses—the catastrophically injured—while overpaying people with smaller losses. In 1977, the Insurance Service's Office product liability closed claims study found that plaintiffs with losses up to $100,000 recovered, on the average, 859 percent of their losses, while catastrophically injured plaintiffs with losses over $1 million received, on the average, only 15 percent of their losses (before paying their attorney's fees). As Leslie Cheek, vice president of federal affairs for Crum and Forster Insurance Companies wrote, "Caps have the perverse effect of perpetuating one of the tort system's acknowledged defects—the overcompensation of small claims and the undercompensation of serious losses."

In sum, while I support an expedited settlement system, I strongly oppose the $250,000 cap in the existing settlement system. Once my data disclosure amendment is implemented, this committee should have better information on which to base its decisions, but I doubt that we will ever have the data to justify such a drastic cap. That data we do have demonstrates that the system fails to adequately compensate those who most need it, while overcompensating those with small claims. The expedited settlement system would only perpetuate this inequity. An expedited process is an important goal; however, it's no excuse for depriving people of their right to justice. Congress must tread carefully on substituting its judgement for the collective wisdon of 12 jurors who have heard the facts of a specific case—particularly in those instances where we are treading on the rights of the severely injured.

JOHN D. ROCKEFELLER IV.

MINORITY VIEWS OF MR. GORTON

The Committee has worked diligently for three Congresses to develop a bill that would begin to address the growing concerns of the impact of our tort system on interstate commerce and that could receive widespread support. Thus, it was a major disappointment for me that I could not vote in favor of reporting this bill to the full Senate for its consideration. Most of the provisions of the bill have my enthusiastic support, although I do have fundamental misgivings about amending the rule on joint and several liability in only one area of tort law. By so doing, we create incentives for procedural maneuvering in order for one party or the other to make or avoid the characterization of an action as a product liability action. Notwithstanding my concern about the Committee's actions with respect to joint and several liability, however, I would have voted to send the bill to the full Senate if that were my only misgiving.

Unfortunately, title II of the bill is so troublesome and inequitable that, in my view, it does not deserve the Senate's consideration. Title II is intended to promote expedited settlements. To the extent that it would do so, however, it would promote settlements in the wrong cases and for the wrong amounts.

A plaintiff wishing to use the expedited settlement system must come forward and offer to settle for his or her net economic loss together with $100,000 for non-economic loss. What plaintiff will make such an offer? Only one for whom $100,000 is close to or greater than the value of the non-economic loss aspect of the claim. To the extent that a plaintiff believes his or her non-economic loss to be greater than $100,000, only those plaintiffs with weak cases will choose to offer to settle. In short, this system will be over-utilized by plaintiffs for whom an offer may elicit a windfall and rarely utilized by those with the greatest loss and need.

If the plaintiff chooses not to offer to settle, what defendant will offer to settle under this proposal? Only one for whom payment of $100,000 for non-economic loss would constitute a bargain. The irony of this system is that a severely injured plaintiff who rejects a settlement offer and wins at trial—loses. He or she loses because the recovery of non-economic loss from a negligent defendant is capped at $250,000 for no better reason than to reward the defendant for making an offer to settle the case for a clearly inadequate sum. The incredible injustice of the system is that the greater the plaintiff's loss, the greater the incentive for the defendant to make such an inadequate offer and the higher the penalty on the winning plaintiff.

Moreover, the wholly arbitrary character of the settlement system is illustrated by the fact that under this scheme, the pain and suffering associated with being rendered quadriplegic is worth no more than the pain and suffering associated with the loss of

hearing in one ear. And the pain and suffering associated with being rendered quadriplegic in the year 2010 will be compensable in the same amount as loss of hearing in one ear in 1987, inflation notwithstanding.

A second aspect of this proposal that is particularly disturbing is the provision which terminates the plaintiff's right to payment for net economic loss if a claim for such a payment has not been made within 5 years. Anyone familiar with cases arising under the States' workers' compensation plans knows that it is not unusual to have a 5-year period in which a diligent and hardworking plaintiff can return to work only to have the cumulative impact of the harm cause a subsequently debilitating condition. As a result, the incentive created by this settlement system is to malinger and continue to incur costs simply to guarantee future potentially vital payments.

In my view, any settlement system we might devise should not only encourage the settlement of valid claims but should do so in an efficient manner with a minimum of transaction costs. This settlement system, rather than reducing transaction costs, is likely to increase them significantly. Many new issues that are material to the parties' rights and which will be litigated in almost every case are created—

(1) Was there any dignitary loss? In many cases, whether an award or settlement is appropriate because of dignitary loss will depend on the characterization of a disfigurement as serious or a determination of whether there was the loss of a limb or bodily function. Thus a judge would have to decide whether a disfigurement which was considered serious by the plaintiff but which might normally prompt a jury to award no more than $60,000, constitutes dignitary loss entitling the plaintiff to $100,000 for pain and suffering. Or is the partial loss of a foot in a case in which the plaintiff can still use the foot a loss of limb or bodily function? A judge in either of these cases may find that there was no dignitary loss not because in a purely factual sense there was none but because he or she views $100,000 as a windfall for that particular injury. Because the disfigurement is found to be not serious or the partial loss of a foot is found to be neither the loss of a limb nor the loss of a bodily function, the plaintiff must either accept $0 for non-economic loss, or at trial the non-economic loss of the plaintiff will be capped at $50,000, even though the jury might place a higher value on it.

(2) What is a reasonable economic expense and reasonable proof thereof? Section 205 provides for payment of net economic loss periodically, as it accrues, upon presentation of reasonable proof of the fact and amount of net economic loss. This presents at least three issues for debate. What is recoverable as economic loss? For some reason, which is unclear, economic expenses that are compensable under the settlement system are not necessarily the same as those compensable under State law. Was the economic expense reasonable as required in the definition? And, was the proof of the fact and amount of the loss incurred reasonable?

(3) What other civil actions are barred by a settlement offer? Section 202 precludes the plaintiff from bringing a civil suit against any person for damages arising from the same harm if a settlement has been agreed to under this title. Does that preclude the plaintiff from suing his insurance company for failing to pay benefits to which he or she is entitled as a result of the harm? Section 202 also provides that such action may be dismissed upon petition by any party to the settlement. Why would a party to the settlement who is not a party to such additional civil action make such a motion? May a person not a party to the Settlement make such a motion?

All these questions will merely serve to encourage debate and delay payment to the plaintiff.

Many other factual and legal issues will arise under this settlement procedure for which answers are not readily available. For example, why are attorneys fees for a successful plaintiff who offered to settle limited to $100,000? Does the 7th amendment to the United States Constitution permit the judge rather than the jury to decide whether there is any dignitary loss? What happens to the plaintiff's payments for net economic loss if the defendant goes bankrupt? And, why are multiple defendants permitted to cap their aggregate liability for non-economic damages at $250,000?

But the most fundamental question which will plague far too many cases and cause untold delay is, "Is this a product liability action?". If it is, the defendant may unilaterally cap damages. If it is not, the plaintiff may recover whatever State law and the jury may allow. For this reason, in any case in which the plaintiff believes that $250,000 is too low a figure for non-economic damages and the plaintiff has a cause of action against a defendant other than a manufacturer or seller, the plaintiff will sue only that other defendant. We will thus be greatly benefiting manufacturers and sellers at the expense of all other defendants.

Accordingly, in those cases where an expedited settlement is most needed, it will be least likely to occur because the caps of the settlement system are so inequitable that the plaintiff will seek to recover on some other theory of law or will proceed to trial to recover more, albeit inadequate, compensation.

The concept of encouraging expedited settlements of valid claims is a sound one. But regrettably, the settlement process of this bill in fundamentally flawed; it expedites settlements only by depriving plaintiffs of a fair and impartial resolution of their claims. I am convinced that expeditious resolution of claims and equitable payment for personal injury are not irreconcilable. When the settlement process of this bill makes that reconciliation, the bill will have my strong endorsement; until then, I must oppose it.

SLADE GORTON.

MINORITY VIEWS OF MR. HOLLINGS

INTRODUCTION

The Product Liability Reform Act is unwise Federal legislation. It would preempt 200 years of common law development in the State courts and legislatures without sound statistical data or evidence to support a crisis in product liability. I urge my colleagues to reject it.

The bill includes a number of sweeping, ill-advised procedural and substantive changes in the law of product liability. For example, title II of the bill establishes new settlement procedures with a cap on non-economic damages. A manufacturer of a defective product effectively can impose the cap at will upon a seriously injured consumer or worker.

Not only is the workability of this settlement system questionable, but the arbitrary cap, like other provisions of the bill, would not solve any problem existing in the tort system. One insurance executive recently addressed this point:

> Worse, from an insurer's standpoint, they [caps] perpetuate current uncertainties about the value of the small claims that make up the overwhelming majority of tort liability payments, and thus would do little to improve the predictability of the system as a whole while inflicting substantial injustice on those seriously injured by another's negligence.[1]

In addition, the bill is riddled with ambiguity and conflicts for court practice and procedure. It would supersede all existing State case law and statutory law in the area it covers while denying Federal question jurisdiction. It is important that my colleagues in the Senate be aware that this bill represents a major departure from our Federal system of government. Yet we are considering this unprecedented measure without credible evidence that it is truly necessary. To the contrary, the development and practice of common law in the States during the last 200 years has worked well to balance the interests of consumers and workers with those of product manufacturers, sellers. and distributors.

In 1984, when the Senate Commerce Committee voted to report S. 44, a predecessor to this bill, I wrote similar concerns about the lack of demonstratable need for this type of sweeping federal legislation:

> Why is this bill necessary? That is the one basic question for which proponents of S. 44 have continually failed to provide concrete answers. When the manufacturers

[1] Footnotes at end.

> began their hue and cry for reform in the mid-70's, the reason was rapidly rising product liability insurance rates. When it became evident that the perceived insurance "crisis" was disappearing, they created a new reason for codification—namely, that the lack of uniformity results in higher transaction costs. . . . Yet they have not provided significant evidence to support this contention, nor have they demonstrated that S. 44, as written, would remedy the alleged problems.[2]

I continue to question the need for federal product liability legislation, especially since the proponents have now returned to their original justification for the bill—rising insurance premiums.

Product liability insurance premiums have swung from a high in the mid-1970's to a low in the early 1980's to another high recently. During Commerce Committee hearings on S. 44 in 1983, witnesses testified that insurance premiums had leveled off or plunged during the previous three years. Trade publications reinforced this point. Today, the liability insurance crisis is again widespread and cuts across many lines. This year, product manufacturers have faced huge premium increases for liability insurance. Some have seen their coverage cancelled or have faced coverage with increased deductibles. Others cannot obtain liability coverage at any price.

These fluctuations in the insurance market have occurred despite the fact that the evolution of tort law in the fifty States has been a slow and deliberate one. No dramatic changes have occurred in the vast majority of the State's common law or case law over the last few years.[3] I find it curious that proponents of federal codification suggest a link between insurance premium prices and tort law only when premiums are rising. I have never heard the tort system credited for the drop in premiums in the early 1980's.

There is little disagreement that the practice of "cash flow underwriting" and the management practices of the insurance companies have contributed to the cyclical nature of the insurance marketplace, with the high and low ends of the cycles occurring like clockwork, every few years. The most recent crisis occurred when interest rates dropped, thereby slowing the rise in investment income.

Various commentators confirm that the crisis is of the insurance industry's own making. For example, the editors of *Business Week* stated that "mainly the industry shot itself in the foot.[4] A study by the National Association of Attorneys General Ad Hoc Committee on Insurance recently concluded that "the cyclical nature of the industry, and not any changes in tort claims, is largely responsible for the current crisis." [5] Similarly, industry executives have recently remarked: "Insurance industry leaders must stand up and squarely accept the responsibility for a crisis that is wholly their fault." [6]

There is vast disagreement over the role of any increasing claims losses and the tort litigation system in the current insurance crisis. Indeed, there is no comprehensive data to support this as a major contributing factor of the crisis. The claims of a tort litigation "explosion", which have been made by proponents of federal condifica-

tion to justify the need for their bill, have been met with convincing evidence to the contrary. For example, a recent study by the National Center for State Courts concludes that an examination of State court data provides no evidence to support the existence of a national litigation explosion from 1981 through 1984.[7]

Proponents of this legislation have used questionable figures to support the alleged existence of a lawsuit crisis. The administration provided figures in its February, 1986, Report of the Tort Policy Working Group to attempt to substantiate its conclusion of an explosive growth in damage awards.[8] However, in response to my question at a Commerce Committee hearing, Assistant Attorney General Richard Willard, the Chairman of the Working Group, admitted that these figures were based on "newspaper clippings." The use of newspaper clippings rather than comprehensive survey data as a basis for making changes in the 200-year old tort system does not meet the legislative standards of the United States Senate.

Recent evidence such as the State court date and the frailty of the evidence used by proponents serve to convince me all the more that any tort reform should occur at the State level. During the 1986 State legislation sessions, some forty legislatures have passed provisions requiring either selected changes to the tort system, increased insurer information and regulations, or new mechanisms for securing insurance from sources other than commercial carriers. Seven other states have not taken other legislative actions but have instituted comprehensive studies of the issue.[9]

Senator Howell Heflin, himself a former State Supreme Court Chief Justice, echoed the views of the Conference of Chief Justices in describing the traditional important role of the States in the area of the developing tort law:

> Tort Law has been left to the States because, as in other areas of law dealing with the rights and duties of the individual such as contract, domestic, and property law, States are best able to develop and enforce tort liability rules that serve the needs of its businesses and consumers. Individual States can decide how best to prevent injuries or allocate the risks and cost of injuries. These decisions necessarily vary to some degree among States depending upon their history, economy, and demographic composition. Without a demonstration that the current system is responsible for serious economic problems, there is no reason to alter that system.[10]

In an era when our Federal Government is working to restore power to State and local jurisdictions, the mad rush to impose the Federal will on State courts in the area of product liability tort law is indeed ironic.

Not only is there no demonstrated need for this legislation, but it contains unfair and unworkable provisions which would curtail the ability of injured consumers and workers to be awarded adequate compensation from a manufacturer responsible for designing an unreasonably dangerous product. Senators Inouye, Gore, and Gorton have presented compelling arguments on these points in their Minority Views.

This legislation, like the predecessor bills before it, does not provide a workable solution for any problems facing the tort system, nor would it result in reduced product liability insurance premiums. It preempts a system that has been providing redress for those injured by defective products for many, many years. It should be defeated.

Absence of Demonstrable Need

1. DISAPPEARANCE AND REAPPEARANCE OF THE CRISIS

The original justification for federal product liability reform was the previous product liability insurance premium crisis in the mid-1970's. At that time, insurers mandated large increases in product liability insurance premiums, and numerous businesses stated that federal action was essential to resolving the crisis.

The primary allegations concerning the existence and magnitude of this crisis proved vastly exaggerated. In 1976, the Federal Government created a Federal Interagency Task Force on Product Liability (hereinafter the Task Force) to examine the problem. The Insurance Study commissioned by the Task Force found that, while insurance costs did increase in the mid-1970's, insurance premiums exceeded 1 percent of the total sales for only three industries.[11]

By 1983, evidence indicated that product liability insurance costs had stabilized or decreased, and that the insurance crisis had disappeared. A 1983 Institute for Civil Justice study concluded not only that reports of a product liability crisis in the mid-1970's were greatly exaggerated, but that even the perception of a crisis had receded because it had become evident that product liability claims had not been an unreasonable cost to most manufacturers.[12] Recently the liability insurance crisis is again widespread and cuts across many lines of insurance.

The increases in product liability insurance costs were a result of the cyclical nature of the insurance industry and the industry's ratemaking practices. The Congressional Research Service has described the repeating cycles of high and low premiums as an historical alteration between soft and hard insurance markets and has discussed the management practices of the companies which contribute to this cycle. In a soft market, rates are adequate, risk selection careful and the industry is generally performing well. New capital is attracted from a number of sources and capacity increases. Price cutting of premiums results when new sources of capacity begin to generate increased competition for available premium volume. Underwriting standards (the standards for deciding whether to insure a particular manufacturer) for risk selection diminish with increased competition and insurers take on riskier business endeavors. According to the Congressional Research Service, this practice results in rising claims losses.

At the point that competition is severe and that losses are too high, insurers withdraw from the market and the capacity shrinks, resulting in a hard market. Availability and affordability problems result as the remaining insurers raise prices and tighten the underwriting standards. Eventually the market stabilizes, a soft market emerges, and the cycle begins again.[13]

Interest rates, which reached historic heights in the late 1970's, aggravated the cycle recently. Companies engaged in a price war in order to obtain a larger volume of premium income for investment.[14] Basically, companies were willing to accept lower premiums for certain insurance lines in order to encourage sales and obtain funds for investment.[15]

On February 19 and March 4, 1986, the Senate Commerce Committee held hearings to conduct a more comprehensive examination of the availability and cost of liability insurance. Testimony was presented at these hearings on the reasons for the recent insurance crisis. Witnesses noted that the insurance crisis had arisen during a period of falling interest rates, prior to which competing insurance companies had been underpricing their product in order to maximize cash flow and enhance investment income. When interest rates began to fall, companies were forced to increase premiums because investment income was no longer compensating for underwriting losses. The recent Committee Report accompanying S. 2129, the Risk Retention Amendments of 1986, states that "This practice of cash flow underwriting was linked directly to the current crisis."[16]

The industry appears to be coming out of the recent crisis. The General Accounting Office testified on May 26, 1986 before the Senate Commerce Consumer Subcommittee that the underwriting cycle has turned again and "is now moving in a positive direction." The industry is projecting substantial net gains over the next five years. The property/casualty industry will enjoy "an expected net gain before taxes of more than $90 billion over the years 1986–1990."

The General Accounting Office also found a profitable industry over the last ten years, stating that "the property/casualty companies had used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes. As a result of the strategy, the property/casualty industry has made between $52 and $79 billion in net gains over the last ten years."[17]

The irony of the continuing debate over a federal product liability bill is that insurance costs were emphasized by the proponents as the reason for passage of a federal product liability bill in the 96th and 97th Congresses when premiums were high, and were deemphasized as a reason for passage of product liability legislation during the 98th Congress when insurance premiums were reduced. In the 99th Congress, the proponents again point to the high premiums as a justification for a Federal bill.

The bills considered in these Congresses have attempted to undercut the rights of injured product users. It seems to me that we have unfair legislation chasing after a justification.

2. CURRENT SYSTEM NOT RESPONSIBLE FOR EXCESSIVE COSTS

Despite the cyclical nature of the insurance market, the argument continues to be made that uncertainty in the tort system produces excessive costs. The contention is that the inability of manufacturers to predict potential liability, expanded tort doctrines, the excessive generosity of jurors in product liability cases, and in-

creased litigation and transaction fees impose unnecessarily high costs upon manufacturers.

The argument does not withstand scrutiny. The Institute for Civil Justice of the Rand Corporation concluded in 1983 that product liability costs in most cases were not excessive:

> It appears safe to conclude that for most large manufacturing firms, product liability costs—including the cost of defending litigations and certain product liability prevention activities—probably amount to much less than 1 percent of total sales revenue.[18]

Equally important, there is no evidence demonstrating that the displacement of State product liability law by the bill reported by the Committee would reduce product liability costs.

A. Product Liability Claims and Awards

The Legal Study commissioned by the Task Force in 1976 concluded that "the volume and size of damage awards in all probability cannot be considered the direct cause of the alleged insurance problems."[19] Although there are no comprehensive studies, available information since then reinforces the Legal Study's conclusion. For example, an Insurance Services Office study published in 1977 rejected the assertion that product liability claims had increased dramatically. The study concluded that the amount paid in closed claims commonly had been overstated by seven to eight times and that the average amount paid per claim for bodily injuries was $3,592.[20] A Carnegie-Mellon investigation of State and Federal product liability cases filed in Pennsylvania from 1963 to 1978 found no significant increases in either the number of legal actions or the amount of awards to claimants.[21] Statistics compiled for claim experience in Kansas in 1981 showed that the product liability closed claims averaged only $5,110.[22]

According to a June, 1983 report by the Missouri Division of Insurance, the number of claims had dropped substantially from 1979 to 1981. As of early 1983, underwriters had filed for an average of 14 percent rate decreases in the State.[23] More recently, the director of the Rand Corporation's Institute for Civil Justice noted that, in the jurisdictions studied, the number of tort lawsuits filed per capita since 1959 has remained constant and the median jury verdict has remained the same after adjustments for inflation.[24]

The only study on the issue of post-jury verdict reduction revealed that one-half of the final punitive damage payments made to plaintiffs were approximately 45 percent of the original jury award. This reduction takes into account post-verdict settlements, remittitur (reduction of the original jury award at the judge's suggestion), and reductions on appeal.[25]

Using data which did not take into account any reductions in the original verdicts, the Institute found different trends with respect to product liability awards in two metropolitan areas. From 1965 through 1979, median awards doubled in Cook County, Illinois, from $59,000 to $120,000, whereas in San Francisco, California, there was little upward movement over the same 14-year period, with the median award going from $51,000 to $57,000.[26]

The median amount represents the dollar amount at the fiftieth percentile when awards are listed from lowest to highest in ascending order. The median is more appropriate than the average award since the average is misleading. A small number of very high awards strongly influences the average award figure and makes it less useful for comparison purposes. For example, in 1978, a jury awarded more than $127 million to a man who was seriously burned when a gasoline tank exploded in an accident involving a Ford Pinto. As a result of that one verdict, the average product-liability award in 1978, according to Jury Verdict Research, hit $1.7 million—up an astounding 285 percent over the previous year's average. But the trial judge later reduced the Pinto award to $6.7 million. Had the statistics accurately reflected that, they would have shown the average award in 1978 to be just 19.5 percent over the previous year, not 285 percent.

The average product liability award figure of over a million dollars, the current statistic often cited by industry leaders and the administration, is based on figures supplied by Jury Verdict Research. The administration has submitted that these statisitics are not scientific and that the company's information was gathered from newspaper clippings.[27] Furthermore, these figures are not median figures and they do not reflect the significant reduction after trial which often occurs. According to the recent press account, "they don't reflect reality very well".[28]

A 1986 study of all civil jury trials over the last five years in Greenville County, the largest county in South Carolina, refutes the notion that juries are running wild. In these cases, 83.6 percent (5 out of every 6 cases) resulted in a verdict either for the plaintiff or the defendant in a total amount of less than $10,000. As a percentage of all cases, only 1.7 percent (11 cases) resulted in a verdict of $100,000 or more. No verdict of $100,000 or more was rendered in any product liability case. Jury verdicts in Greenville County are three percent above the national average.[29]

A study of a representative group of State courts released in April 1986 by the National Center for State Courts found that the increase in tort litigation roughly approximated the increase in total population with all tort filings increasing nine percent and the population increasing eight percent for the period 1978–1984. According to the report, the data "provides no evidence to support the existence of a national litigation explosion in state trial courts" during the 1981–1984 time period.[30]

It is true that the number of liability cases filed in Federal courts has increased significantly. But according to Consumer Reports, a single type of suit—damage claims related to asbestos—accounts for much of the increase. Last year, 4,239 of the 13,554 product liability cases or 31 percent filed in Federal courts were asbestosis cases. Consumer Reports believes the large number of asbestos-related cases is not suprising and believes the cases are not frivolous:

> Asbestosis and asbestos-induced cancer results from many years of exposure; only in recent years have the consequences of long-term exposure become evident in debilitating illness and death. In Consumer Union's opinion,

> people who are suffering from asbestosis or asbsetos-induced cancer (and the families of those who have died) deserve compensation.[31]

Finally, according to a study published in 1985, a sixteen-State study covering 100 years found little evidence of a consistently upward trend in tort lawsuit [32] and the University of Wisconsin Civil Litigation Research Project found fifty percent of the cases involved disputes of $10,000 or less and only 12 percent involved claims of more than $50,000.[33] The repeated allegations about the number and size of awards simply do not hold up in light of this substantial evidence to the contrary.

B. Substantive Law

The Task Force concluded that uncertainties in the substantive law of product liability were a cause of the insurance crisis. This conclusion, however, was at odds with the findings of the Legal Study commissioned by the Task Force. The Legal Study concluded that State tort rules have no significant impact on insurance costs, and thus a revision of the system would not lower them:

> [T]he overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, no inequitable doctrine or group of doctrines even if changed immediately, could produce a greater availability of or a lower cost for insurance.[34]

After studying the issue, one tort professor concluded that "the subsequent easing of the Crisis supports the Legal Study and undercuts the Task Force on this critical issue." [35] If there were a significant connection between legal doctrines and product liability costs, the stabilization of insurance costs in the late 1970's would not have occurred at the same time that the substantive law of product liability remained unchanged.

More recently, the same professor again reached the same conclusion regarding the relationship of tort doctrines and the current insurance crisis:

> There is no reason to believe that the tort system contributed at all to the decrease of product-liability insurance premiums at the end of the last decade, or the increases which may currently be taking place. No correlation in the slightest exists between expansions or contractions of tort doctrine during those periods and the level of premiums. The same may be said with respect to the size of jury awards and settlements.[36]

As the Legal Study found, there are isolated instances of product liability cases in which the result is inequitable. Proponents like to cite their favorite horror stories. But these examples serve little purpose other than to distort the policy debate. To base such sweeping federal legislation on anecdotal evidence is, at best, specious—at worst, fraudulent.

Changes in tort law will not solve the insurance crisis. Indeed, in hearings before State legislatures, insurance industry representatives have declined to promise that the tort reform measures they advocate would result in lower insurance premiums.[37] In Washington, a number of companies filed for premium increases claiming that the State's new tort restrictions will not have an impact on insurance costs.[38] One insurance executive stated: "It is clearly impossible to say if you adopt a certain tort reform, you will get an 'X' reduction in premiums."[39] The connection between the anecdotal cases cited by the industry, changes in the substantive tort law, and insurance costs is far too attenuated to justify revision of an entire body of law which generally has proven to be fair and workable.

C. Litigation and Transaction Costs

One justification offered for federal product liability legislation is that legal fees paid to plaintiffs' attorneys are too high. Typically, lawyers who accept product liability cases work on a contingency fee basis. If they win the case they get a percentage of the case (which is usually about 30 percent); if they lose, they get nothing. This system allows injured plaintiffs who are not wealthy to obtain a lawyer. At the same time, the system acts as a deterrent to frivolous cases because attorneys are spending their own time and money in the case.

Recently released figures from the Institute for Civil Justice state that plaintiffs receive appropximately one-half of the costs of litigation.[40] Any problem with the cost of the system is not with the cost of the attorney who is "investing" his or her own time and money to win a case. The problem is with the defense attorney who has an incentive to delay the case with dilatory motions and thereby encourage severely injured plaintiffs to settle for less in order to get a expedited payment of the plaintiff's medical and other costs. Meanwhile, the complany is making interest on money that would otherwise be in the hand of the prevailing plaintiff.

According to calculations derived from a 1977 survey conducted by the Insurance Services Office, for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs, while for every dollar awarded to a plaintiff, the plaintiff pays an average contingent fee of 33 cents.[41] While I do not advocate wage and price controls, those who advocated reform of the system should be focusing on the higher defense costs. An imbalance would be created if the fees of lawyers for injured consumers were controlled, while not limiting the defense lawyers' costs. In that case, the only effect would be to undermine our legal system's guaranteed right of access to justice.

Overview of the Current System

What little information we do have about the current product liability system provides an interesting perspective: the system is generally fair and workable. According to one study, approximately 73 percent of the bodily injury claims and 83 percent of the property damage claims are settled without the filing of a lawsuit. Only 3.5 percent of claims go all the way to a court verdict, and in those

cases, fewer than 25 percent of defendants are found liable. Thus, 96.5 percent of product liability claims are resolved before the verdict and more than 75 percent of plaintiffs lose in cases in which a verdict is reached.[42] The American Bar Foundation, in study of seven counties from across the country, found that the percentage of cases in which the plaintiff was successful ranged from 28 percent to 56.3 percent.[43] So, we know that it is difficult to win a product liability lawsuit when the case goes to trial and verdict.

The studies to date show that punitive damage awards remain infrequent, particularly for product liability, and that damages decided upon by the jury are often substantially reduced.[44] The truth of the matter is that if actual damages are not sustained by the evidence, they are lowered at the insistence of the judges themselves who would otherwise order a new trial. And what about those million dollar awards by juries? In more than two-thirds of the cases with million dollar awards over the past 14 years, the plaintiffs have suffered gross and serious injuries or death.[45]

We also have been told that many of the individual jurisdictions are experimenting with programs such as arbitration programs and are successfully speeding up the consideration of cases.[46] Ninety-eight percent of civil cases pending in my own state of South Carolina, for example, have been pending for less than a year.[47]

Certainly, juries sometimes (and it seems increasingly) award damages against institutional wrongdoing. For example, in the University of Georgia case, the plantiff was awarded 2.5 million dollars against the University, although the amount was later reduced by over one-half of the original award. The plaintiff alleged that she was fired in retaliation for speaking out against preferential treatment of athletes on scholarships.[48] The jury decided that the institution was liable for wrongdoing and felt that a large damage award was necessary to prevent this situation from occurring there or at any other institution in the future. Some researchers have hypothesized that plaintiffs receive large jury awards because jurors view certain defendants as having "deep pockets." However, interviews with jurors in Federal and State courts in Southeast Pennsylvania revealed no significant finding that awards were based on the ability of the defendant to pay. The jurors' decisions rested primarily on their consideration of whether the plaintiff deserved to win based on the facts of the case and the applicable law, as well as the necessity to deter misconduct.[49]

When a product liability case goes to trial, the jury is not impaneled for the purpose of giving away someone else's money. Rather, it is charged with the administration of justice. These juries are composed of our friends and neighbors, who conclude, some of the time, that the defective products involved and the injuries sustained require compensation. And it is our friends and neighbors—who work for a living and know the value of a dollar—who occasionally conclude that punitive damages are justified when the defendant has engaged in outrageous behavior.

There are countless examples illustrating how our product liability system has provided incentives for the development of a safer society. Product liability lawsuits can be credited with, among many other examples, the elimination of cancer-causing asbestos as

a common building material. The trial process also has prompted State and Federal agencies to promulgate and enforce more vigorous safety standards for many products. With the opportunity to compete on the free market goes the duty to produce products that are not unreasonably dangerous as well as the responsibility to make reparation for any harm caused when that duty is neglected. Because we have a system which enforces this ideal, we can proudly state that ours is the safest nation on the planet.

CONCLUSION

A Committee of the United States Senate should not report legislation to codify product liability tort law without any comprehensive data to demonstrate (1) that such legislation is necessary, and (2) that such legislation will work.

Do we know what we are getting into? Based on the scant statistical evidence provided by proponents of this legislation, the answer to that question is: "obviously not." We don't know whether the enactment of this legislation would affect insurance premiums, or whether there is any connection at all between insurance premiums and tort law. We don't know the burden we would create for the State courts to administer such legislation. We don't know how it would affect the development of safe and reliable products. In other words, the Committee has chosen to close its eyes, say a few prayers, and go for broke. While I agree that successful government depends on the willingness of its leaders to engage in bold experimentation, the Product Liability Reform Act represents a recklessness this Nation cannot afford. If we must attempt to tinker with the product liability system, then let us do so armed with the facts and with an eye toward the protection of our society from unsafe and dangerous products.

If any problems exist with the product liability tort system, we are not going to solve them with legislation of this type. The bill should be rejected.

ERNEST F. HOLLINGS.

FOOTNOTES

[1] Cheek, *Insurers Love Tort Reform 'Not Wisely But Too Well'*, Mealey's Litigation Reports 45 (July, 1986).

[2] Rep. No. 476, 98th Cong., 2d Sess. 72 (1984).

[3] *Hearing on Product Liability Before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. (1986) (Statement of Professor Marshall S. Shapo) Testimony on file at Senate Committee on Commerce, Science, and Transportation) [hereinafter cited as 1986 Hearing on Product Liability].

[4] *See Insurers Must Take Part of the Rap*, Business Week, March 10, 1986.

[5] National Association of Attorneys General Ad Hoc Committee on Insurance, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance 37 (May, 1986). (Report on file at the Senate Committee on Commerce, Science, and Transportation).

[6] Smith & Nichols, *Who's Really to Blame for the Current Insurance Crisis?* Rish Management, 44 (July, 1986).

[7] National Center for State Courts, Court Statistics and Information Management Project, A Preliminary Examination of Available Civil and Criminal Trend Data in State Courts for 1978, 1981, and 1984 (April, 1986) (Report on file at Senate Committee on Commerce, Science, and Transportation).

[8] Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 36 (February, 1986). (Report on file at the Senate Committee on Commerce, Science, and Transportation).

[9] National Conference of State Legislatures, Capital to Capital, A Report to Congress From State Legislatures, (June, 1986) (Report on file at the Senate Committee on Commerce, Science, and Transportation).

[10] S. Rep. No. 476, 98th Cong., 2d Sess. 107 (1984).
[11] U.S. Department of Commerce, Interagency Task Force on Product Liability, Final Report VI-20 (1977) [hereinafter cited as Task Force Final Report].
[12] Rand Corporation, The Institute for Civil Justice, Designing Safer Products: Corporate Responses to Product Liability Law and Regulation 121 (1983) [hereinafter cited as Designing Safer Products].
[13] *See* Congressional Research Service, Property-Casualty Insurance Market, (March 20, 1985).
[14] *See A Rate War Rips Casualty Insurers*, Business Week, December 8, 1980.
[15] *1986 Hearing on Product Liability, supra* note 3, (Statement of Johnny C. Finch, Senior Associate Director, General Government Division General Accounting Office) (Testimony on file at Senate Committee on Commerce, Science, and Transportation).
[16] S. Rep. No. 294, 99th Cong., 2d Sess. 4 (1986).
[17] 1986 Hearing on Product Liability, *supra* note 3 (Statement of Johnny C. Finch, Senior Associate Director, General Government Division General Accounting Office) (Testimony on file at Senate Committee on Commerce, Science, and Transportation).
[18] Designing Safer Products, *supra*, note 12 at 121.
[19] Interagency Task Force on Product Liability, Final Report of the Legal Study III-131-32 (1977).
[20] Designing Safer Products, *supra* note 12 at 29.
[21] Carnegie Mellon University, Department of Engineering and Public Policy and School of Urban and Public Affairs, Product Liability Tort Reform: Crisis of Uncertainty (1979).
[22] Bell, Kansas Insurance Department Product Liability Statistics and Closed Claim Report in Accordance With KSA 40-1130 (1982).
[23] Ainsworth, Product Liability Close Claim Data in Missouri 1978-81 (1983).
[24] Statement of Gustave Shubert, Director, Rand Corporation, Institute for Civil Justice, before the National Conference of State Legislatures, Denver, Colorado, January 4, 1986 (Statement of file at Senate Committee on Commerce, Science, and Transportation).
[25] Rand Corporation, the Institute for Civil Justice, Punitive Damages: Preliminary Empirical Findings, 14 (1985) [hereinafter cited as Preliminary Empirical Findings].
[26] Rand Corporation, The Institute for Civil Justice, Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980, 31 (1983), Rand Corporation, The Institute for Civil Justice, The Civil Jury, Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979, 28 (1982).
[27] *See* Transcript of Senate Committee on Commerce, Science, and Transportation, Consumer Subcommittee, Hearing on Product Liability, 99th Cong., 2d Sess., 25-27 (May 20, 1986).
[28] 51 Consumer Reports 545 (August, 1986).
[29] *Hearing on Product Liability, supra* not 3 (Statement of J. Kendall Few) (Testimony of file Senate Committee on Commerce, Science, and Transportation).
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[37] *Tort Reform in Georgia Carries Price Tag*, Journal of Commerce, March 5, 1986, at 12A.
[38] National Underwriter, May 2, 1986, at 4.
[39] *Tort Reform in Georgia Carries Price Tag*, Journal of Commerce, March 5, 1986, at 12A (quoting Franklin W. Nutter, President, Alliance of American Insurers).
[40] Hearing Before the Subcommittee on Trade, Productivity and Economic Growth of the House Joint Economic Committee, *99th Congress*, 2d Sess. (1986) (Statement of James S. Kakalik).
[41] S. Rep. No. 476, 98th Cong., 2d. Sess. 7 (1984) (citing Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results at 11 (1977).
[42] See Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results at 95 (1977); *1986 Hearings on Product Liability, supra* note 3 (Statement of the Public Citizen's Congress Watch, Consumers Union, U.S. Public Interest Research Group, Consumer Federation of America) (Testimony on file at Senate Committee on Commerce, Science, and Transportation).
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[44] *Id.* at 15; Preliminary Empirical Findings, *supra* note 25 at 14, 16.
[45] Glaberson & Farrell, *The Explosion in Liability Lawsuits Is Nothing but A Myth*, Business Week, April 21, 1986, at 25.
[46] Conversation between Gustave Shubert, Director of Rand Corporation, Institute for Civil Justice, and Senator Ernest F. Hollings, Washington, D.C. (May, 1986).
[47] *1986 Hearing on Product Liability, supra* note 3 (Statement of J. Kendall Few) (Testimony on file at Senate Committee on Commerce, Science, and Transportation).
[48] New York Times, Jan. 14, 1986, at 1, col. 7.
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MINORITY VIEWS OF MR. INOUYE

Taken out of context, million dollar awards for "pain and suffering" or other "noneconomic" damages may seem excessive. "Caps" on such damages therefore seem convenient avenues for cost savings or incentives for settlement. But such awards are not made in the absence of a context. They are made because a judge or jury determines that the award will approximate the amount necessary to compensate a man who has been crippled, or woman who has been made barren, or child who lives forever in pain. A cap in such very real circumstances amounts to telling a victim that, as matter of Congressional policy, the pain that he has suffered or quality of life he has lost is only worth $150,000, $250,000 or some arbitrary figure selected because it sounds fair. I believe that this is unjust to the point of absurdity and I, therefore cannot support any legislation which contains such caps.

DANIEL K. INOUYE.

MINORITY VIEWS OF MR. GORE

I am compelled to oppose the Committee bill. I do so despite sharing the chairman's desire for legilsation that would "provide swift and more certain recovery for those injured by defective products." I have cosponsored legislation with Senator Gorton which would achieve those goals. The Committee bill, however, fails to assure justice, fairness and adequate compensation for those injured by defective products. Its also undermines vital safety incentives that the current tort system brings to the marketplace.

The sharp 10-to-7 Committee split on this bill reveals anything but consensus. A simple review of the several changes that the Committee bill would make in tort law uncovers a grave imbalance: the legislation would do much to discount the potential liability of makers and marketers of dangerously defective products; it would do little to protect the interests of those injured by such products and of consumers in general.

The Committee bill would: (1) enable the makers of dangerous or defective products to impose a cap on compensation for pain and suffering, even when negligent behavior causes severe injury; (2) alter the doctrine of joint and several liability and thereby reduce the ability of victims to recover fully for their injuries; (3) make it more difficult for plaintiffs' to recover puntitive damages; (4) limit plaintiffs' ability to hold product sellers responsible for marketing unreasonably dangerous or defective products; (5) make it impossible for consumners injured by faulty equipment that is more than 25 years old to recover a penny; (6) establish unnecessarily weak record retention requirements; and (7) fail to even begin to address the problem of excessive transaction costs stemming from the abuse of protective orders during discovery.

By themselves, however, the cap or recoveries and the alteration of joint and several liability render this legislation fatally deficient. I will focus my remarks on these two dangerously inequitable provisions.

ONE

Under the settlement system established in title II of the Committee bill, manufacturers guilty of the most flagrant wrongdoing and those responsible for the most grievous injuries would be able to place a fixed limit on their own liability. Their victims, no matter how badly injured and no matter how strong their cases, would, by definition, be undercompensated; manufacturers would be able to avoid the full cost of the injuries their dangerously defective products created. Senator Gorton has outlined the various problems with the settlement system in the Committee bill and I agree with his comments. No settlement system so explicitly at war

with the twin policies of fair compensation and the promotion of marketplace safety can ever begin to meet the test of justice.

THE PAIN AND SUFFERING CAP

Under title II, whenever, a manufacturer offered a victim payment for out-of-pocket expenses plus $100,000 for the non-economic losses brought on by any permanent disability or impairment, the victim's recovery for pain and suffering would, in any trial following rejection of the offer, be limited to $250,000. This limit would apply no matter how devastating the injury and no matter how convincingly the victim demonstrated that the manufacturer was guilty of wrongdoing.

To compound this injustice, the real recovery limit that this system would create if put into practice would not be $250,000, but the $100,000 include in each settlement offer. Knowing that the long and grueling process of litigation would bring no more than $150,000 more than the initial settlement offer, even the most severely injured victims would feel compelled to accept the initial offer despite its inadequacy. As a result, title II would in reality impose a $100,000 cap on the non-economic loss recoveries of injured victims.

The rationale for the title II cap is that it would provide an indispensable incentive to settle cases and therefore lower litigation costs and reduce delays in the system. To be sure, these are important goals. The settlement incentive in the Committee bill, however, would apply only in those cases where victims had suffered the most devastating—and expensive—losses. The cap in these cases, precisely because it is a cap, would work the greatest injustice against individual victims and pose the gravest threat to the tort system's capacity to create safety incentives.

For manufacturers, the $250,000 limit on a plaintiff's recovery would be attractive only when the plaintiff's actual losses substantially exceed that limit. Only in those cases would the cap translate into genuine financial savings for manufacturers. Thus the cap would be a meaningful settlement incentive only where it gives manufacturers the opportunity both to undercompensate victims significantly and to insulate themselves from the full costs that their dangerously defective products impose on society.

As public policy, this system of incentives is appalling: it would create a cycle where the undercompensation of victims, and the attendant insulation of manufacturers from incentives for the marketing of safe products together lead to an increase in unsafe products on the market, and more undercompensated injuries. Most ominously, title II would permit manufacturers of dangerously defective products to drive this cycle simply by making self-serving settlement offers.

Title II's cap would indeed succeed as a settlement incentive, but only by undermining the fundamental policies of tort law—provising just compensation to injured victims and creating incentives for safe products.

COMPENSATION FOR PAIN AND SUFFERING

Although pain and suffering may be difficult to quantify, it is tangible, compensable loss that should not be denied injured victims who prevail in product liability lawsuits. Congress must not sacrifice justice to reduce the cost of litigation. Injuires that cause brain damage, quadraplegia or blindness, for example, bring ruin to the lives of their victims. Those injuries invariably require compensation beyond wage replacement, medical, expense payment and payments for other categories of strictly "economic" damages.

The bill's author have determined that $100,000 in settlement, or up to $250,000 in litigation will compensate, or make whole: individuals who lose their arms, legs or eyesight; those who suffer brain damage or lose the ability to bear children; and those who suffer servere burns. At the Committee markup, Senator Inouye may have said all there is to be said on the unfairness of caps, but consider for just a moment the injustice so such caps on pain and suffering recoveries in the following cases:

> A 5-year-old Arizona girl was severely burned over 82 percent of her body when a defective camp stove spewed fuel 6 to 8 feet into a smoldering campfire pit, igniting her clothing. The child's life has been devastated by the 15 operations she has already undergone and the many more that doctors anticipate she will need. While hospitalized for these severe burns, she received extensive antibiotic treatment to fight infections. This treatment resulted in auditory nerve damage and partial deafness.
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> A 26-year-old Kentucky coal miner lost one eye and his sense of taste and smell, and developed permanently disabling epileptic seizures when a defective mining machine trapped him in a 30-inch seam of coal.
>
> A 4-year-old girl received severe third degree burns over 48 percent of her body, including her face and neck, when her inadequately tested, insufficiently flame-resistant flannel shirt was ignited by a butane lighter. The fingers of right hand were amputated, she has had to endure multiple surgeries and skin grafts, and she has bone infections and will need to undergo many additional surgeries, including reconstructive operations.
>
> An 8-month-old Michigan infant suffered a fractured skull and brain damage resulting in cerebral palsy and quadraplegia when a defective carseat failed to protect him during an automobile accident.
>
> A 19-year-old California power press worker had his hands crushed when a power press that lacked guards and warnings slammed down and locked for 8 minutes.

It is extraordinary that the committee would decree that victims such as these are entitled to no more than $250,000—or $100,000—for the agonies of their injuries and ruined lives. Members of Congress simply have no basis to bargain or barter their way toward an arbitrary limit on the compensation that should be awarded for pain and suffering in these kinds of cases. I believe we should leave

those decisions where they belong: in the courts and jury rooms where the facts of each of these cases are deliberated.

DANGERS OF INFLEXIBLE CAPS

Over time, economic and social conditions will add to the injustice of title II's arbitrary caps on pain and suffering awards. Inflation and changes in life expectancy, for example, affect the amount of money needed to provide services or maintain a minimally adequate lifestyle for life-long pain and suffering.

Time itself will add insult to the injury created by title II's non-indexed, fixed-dollar cap. Consider the case of a 35-year old who suffered quadraplegia in 1975 as the result of injuries caused by a defective product. According to the Insurance Services Organization, the average 35-year old quadraplegia victim would have received a $505,000 award in 1975. The award probably would have included about $63,000 for medical expenses, $190,000 for lost earnings and other economic loss, and approximately $253,000 for pain and suffering—approximately the title II cap in this legislation.

Assume the occurrence of the very same injury in 1984. To treat this victim as fairly as the 1975 victim, the 1984 victim should receive an award of $1,082,000, given (1) the Insurance Services Office estimate that pain and suffering equals approximately economic loss for this type of award, (2) a 90-percent growth in median household income between 1975 and 1984 (from $11,800 to $22,400, according to U.S. Department of Commerce statistics), and (3) a 185-percent increase in hospitalization and other treatment costs during this same period. This figure does not include increased life expectancy (5 percent) or social changes during this nine-year period.

A $250,000 cap on pain and suffering that may have been considered reasonable in the context of a particular half-million dollar settlement or verdict in 1975, would fall far short of meeting the equivalent economic and social needs of victims today.

CAPS ARE NOT NECESSARY TO PROMOTE SETTLEMENTS

Though title II's cap would do much to damage the fairness of the tort system, it would do little to augment incentives for just settlements. First, the cases in which the cap would have any significant bearing on either party's decision to settle—those cases involving the most severe injuries and the largest price tags, represent only a tiny percentage of product liability claims. According to the Insurance Services Office, 91 percent of the product liability claims or settlements that result in some form of payment to the injured party involve no permanent disability. Denying the small group of severely injured consumers full recovery for their losses, therefore, would do little if anything to promote settlement in the vast majority of product liability cases.

Second, even for those who do suffer the greatest injuries, a cap on recoveries would add little to the many strong incentives such victims currently have to settle their cases quickly. Victims of devastating injuries face pressing needs to pay their necessary health care, rehabilitation and change-of-lifestyle costs. They also long to put behind them, rather than protract, the psychological trauma of

being injured. Not surprisingly, the Insurance Services Office found that 96.5 percent of product liability claims are resolved out of court; only 3.5 percent result in a verdict.

Again, the presence of these incentives only highlights the injustice of the cap. Only those who could truly mount strong cases and who had suffered overwhelming noneconomic losses would defy the existing incentives to take on the stress, delay and uncertainty of full-blown litigation. Yet, it would be only these victims who would be genuinely affected by the cap—and that effect would constitute nothing but a penalty. The settlement provisions in the Gorton-Gore alternative, as well as a modified version of the settlement system based on Rule 68 of the Federal Rules of Civil Procedure—which the Committee initially adopted—would do much to foster the goals of efficient, fair settlements, without resorting to an arbitrary cap on damages.

Moreover, the settlement procedure will operate at cross purposes with its stated goal of reducing the amount of litigation and lowering transaction costs. Under the procedure, the court must make a number of decisions even if the parties agree to settle the case, and even after settlement. The decisons are difficult ones whose resolution undoubtedly will entail full written briefing and oral argument.

DATA DISTORTION

Some proponents of this legislation claim there is a need for such arbitrary, inflexible caps on pain and suffering based on selective, inadequate data concerning jury verdicts. For example, they cite data from Jury Verdict Research (JVR) showing an increase from one million-dollar verdict in 1962 to 400 in 1984 to demonstrate the need for caps. In a report that analyzed this same data, the Consumer Federation of America (CFA) concluded that there is no statistical evidence of real dollar increases in product liability verdicts over time.

The CFA report pointed out many ways in which JVR data have been misused. First, JVR data are not gathered in a systematic, scientifically acceptable fashion—they rely predominantly on newspaper clippings and interviews for information concerning jury awards. Second, the numbers do not take into account verdicts for defendants or verdicts that are overturned or reduced on appeal. Indeed, a recent Rand Corporation study found that as many as half of the initial jury awards studied were reduced after trial. Third, the verdicts are not stated in real dollars—JVR does not account for growth in average earnings over time, medical cost increases that exceed inflation, population growth or increases in life expectancy.

If these factors are taken into account, a million dollar verdict in 1984 would have been equivalent to a $200,000 verdict in 1962. Just by adjusting for inflation, $300,000 in 1962 had the same purchasing power as a million dollars in 1984; in the same 22 years, real per capita income increased by over 66 percent; hospital costs increased by about 100 percent above inflation; and life expectancy increased by over 5 years.

Two

Section 308 of the Committee bill eliminates the common law doctrine of joint and several liability for all noneconomic losses. That provision will discourage settlements. It will also expand, complicate, and thereby increase the cost of litigation. Most important, the provision will deprive innocent victims who suffer noneconomic damages of full recoveries for their injuries.

Joint and several liability is one of the most misunderstood tort rules. Contrary to popular myth, the doctrine does not mean that in all lawsuits a party can be held liable for the damages even if it were only 2 percent "responsible" for the harm. As an empirical matter, those supporting this legislation have not presented evidence that shows this to be anything but a myth.

More significantly, joint and several liability applies only when there is an indivisiable harm resulting from the conduct of more than one party. A victim suffers indivisible harm in any situation where multiple parties engage in injurious conduct, yet the conduct of any one of the parties in itself could cause the entire injury, or the conduct of each of the parties is an essential factor in the injury. By definition, the degree of responsibility for indivisible harm cannot be divided among defendants in a logical fashion.

A common illustration of indivisible harm involves the victim of two gunshot wounds inflicted by different individuals, each with fatal force. During the Committee's consideration of the joint and several issue, Senator Gorton described another example: An individual driving an unstable jeep loses control while trying to avoid an oncoming drunk driver, on a poorly designed and maintained roadway. In contrast, the doctrine of joint and several liability does not apply to situations where responsibility can be apportioned, as in the case of victim of two nonfatal gunshot wounds to two different parts of the body.

Under modern tort law, joint and seveal liability has provided that where one wrongdoer's conduct alone could have caused the injury or the injury is otherwise indivisible, the loss cause by the injury should fall on the wrongdoer rather than on the innocent victim. Joint and several liability allows a victim to recover compensation for harm even where one or more of the wrongdoers is insolvent or beyond the reach of the court. A wrongdoer may obtain contribution from other responsible parties and thereby spread the cost of the harm equitably among wrongdoers.

Section 308 invalidates joint and several liability as a means of placing the burden for a victim's injury on responsible parties, severely undermining a victim's ability to obtain full recovery. The provisions will yield particularly perverse consequences in cases where victims suffer significant noneconomic injury. In situations resulting in the loss of reproductive capacity, for example, economic loss may be minor and the noneconomic injury costly and devastating. Similary, the noneconomic harm suffered with paraplegia or quadraplegia, or the loss of a limb or one's eyesight or hearing, is substantial. Section 308 will reverse current law and shift the burden of providing compensation for these and other injuries from those responsible for the injury to innocent victims.

In addition, this provision would place the burden on an innocent victim to demonstrate the precise degree for responsibility for any defendant already proven to be responsible. As initially drafter, section 308 recognized that the responsibility for indivisible harm could not in fact be calculated in a logical, equitable, or practical manner. The original Committee language retained joint and several liability in situations involving truly indivisible harm. In practice, joint and several liability, together with the law of contribution, has allowed wrongdoers to determine among themselves the degree to which each shall be responsible, based upon market shares and other measures. Section 308 now requires an innocent victim who has already proven liability to apportion responsibility among culpable defendants. It forces a judge and jury to engage in that same arbitrary assessment, a process that often amounts to guesswork.

There are many situations such as in environmental harm and asbestos cases where, because of the large number of manufacturers, the mixing together of harm-causing substances, and the time lapse between wrongful action and the victim's injury, it is virtually impossible to prove a particular degree of responsibility for any one defendant. In these cases, section 308 may allow all defendants to escape liability for noneconomic damages even though all are proven responsible for the injury suffered.

Instead of establishing an efficient system of prompt and fair recoveries while reducing transaction costs, the Committee bill will serve only to complicate and lengthen the litigation process. Joint and several liability, with its threat of full liability, induces settlement; parties responsible for harm are encouraged to settle cases in order to eliminate the risk of being held fully liable for an injury to which others have contributed. Insurers seek to avoid bad faith liability for failing to settle such cases.

The Committee bill would turn these inducements upside down. Defendants and their insurers will be encouraged to resist settlement until the precise parameters of liability become clear, since a defendant could never be liable for more than the amount of damage that the injured person can prove the defendant responsible for. To counsel otherwise is to gamble that a plaintiff could prove that a greater degree of responsibility should be apportioned than appears to be the case at the early stages of the lawsuit.

The importance of reducing transaction costs has been a constain refrain during the consideration of this legislation. Given that concern, one would presume that an appropriate remedy would not be to encourage additional litigation. This revision of the joint and several liability doctrine will prohibit a victim from recovering for any harm committed by a potential defendant that has not beensued. Consequently, section 308 encourages victims to identify and sue each and every party that might be remotely responsible for the injury. That change will increase the number of parties before the court, the number of issues and motions to be resolved, the cost of litigation, and, in many instances, the complexity of a given case.

The bill would also overturn traditional legal doctrine concerning concerted action, holding defendants only severally liable for noneconomic damages even where they act according to a common

plan or design. Plaintiffs would be required to establish the percentage of responsibility of each defendant for the harm, even though the defendants may have acted together to cause them harm. This extreme deviation from the original meaning of a "joint tort" would make it more difficult for plaintiffs to recover all damages.

Taken together, the settlement procedure in title II and the several liability rule in section 308 effectively leave injured persons without anything approaching fair compensation for pain and suffering. The settlement system caps the amount of damages for noneconomic loss; the rule of several liability makes it difficult to recover even the capped amount. In return for the abrogation of their rights, the most severely injured persons receive little if anything. For these victims the bill will not promote equitable settlements or reduce transaction costs, and therefore must be rejected.

ALBERT GORE, JR.

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